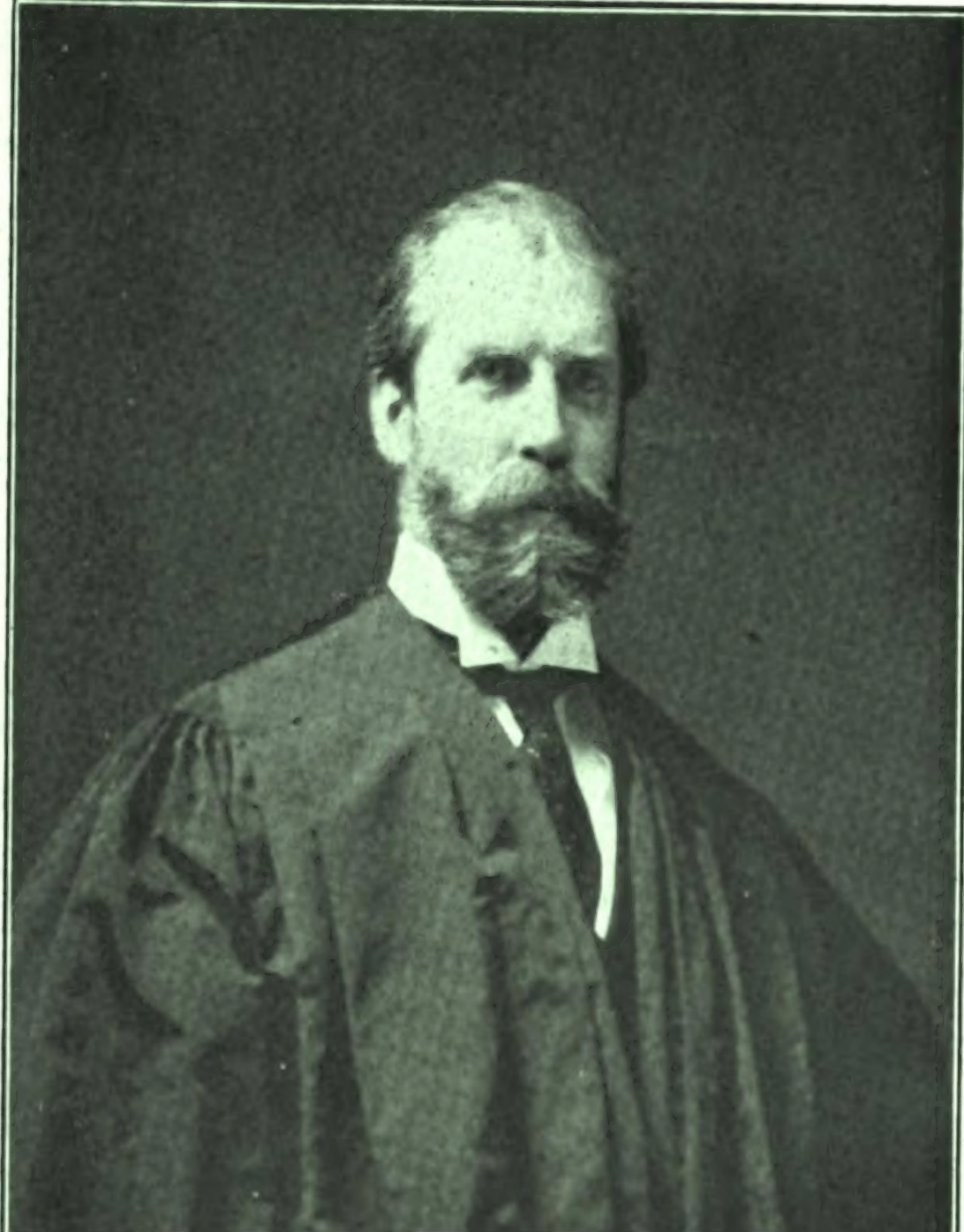




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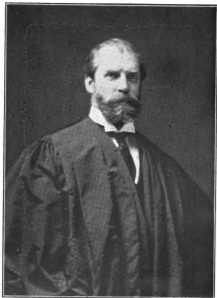
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JOHN D. LAWSON, LL.D.

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MR. JUSTICE HUGHES

THE
AMERICAN LAW REVIEW.

JANUARY, 1901.

THE LAW OF THE UNITED STATES AND THE PROCESS

of the law of the United States is a subject of increasing importance to the American lawyer. The law of the United States is not only a subject of increasing importance to the American lawyer, but it is also a subject of increasing importance to the American citizen. The law of the United States is not only a subject of increasing importance to the American lawyer, but it is also a subject of increasing importance to the American citizen. The law of the United States is not only a subject of increasing importance to the American lawyer, but it is also a subject of increasing importance to the American citizen.

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THE AMERICAN LAW REVIEW.

JANUARY-FEBRUARY, 1911.

THE LAW OF COMBINED ACTION OR POSSESSION.

I shall consider here the law of combination, whether of persons or of properties or privileges or franchises, and whether such law differs from the law of the acts and possessions of the individual, and if so in what particulars. This subject is the most important law topic today; it is one of the very earliest doctrines of the English law, one which distinguishes the early common law from the law of other countries, and yet was recently, or it may be said still is, one of the most forgotten and the most misunderstood. What remained of it in the minds of lawyers, our fathers' contemporaries, was merely the law of conspiracy; usually understood to mean criminal conspiracy, and even in that narrow field regarded as a law mysterious and technical. The common law on the subject became almost forgotten; the early statutes were unknown; and that is why most of our anti-trust legislation, the Sherman Act included, and much of our legislation in the matter of labor combinations, is confused and clumsy and apt to be either unnecessary or unconstitutional. And now we are told by recent discoverers or agitators that the very basis of this law should be changed. It is asserted—not only by Mr. Gompers, but by learned judges, and even by the British Parliament—that modern conditions demand the removal of this entire body of law from our jurisprudence,

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that is to say, they advance the specious theory that the law of the acts of one should be identical with the law of the acts of many; correspondingly, that the law of the possessions of one should be identical with the law of possessions of many, even though that many be not natural persons, but corporations or aggregations of corporations, labor unions, or finally, one huge corporation, national in extent, which we call the trust. The recent English Act of Parliament says that no act done or intended, and no combination by a number of persons, shall be criminal or even subject them to damages, when no act actually done by them in the combination is criminal in itself. No one has yet proposed that the corresponding principles should be extended to the field of capitalism—that is to say, that no ownership or combination of capital or corporations should in any way be reprehensible, when its component parts were lawfully constituted. The English statute indeed applies only to a certain class, favored above all other classes in modern legislation; that is to say, the class of those who perform skilled labor with their hands. Such a limitation would, of course, be impossible in this country, but the principle of the supposed reform is specious, and to the unlearned in history and in the essentials of liberty, almost unanswerable. Why should a few men be punished or be liable when no one does anything that is criminal, and even the combination intends no crime?

The answer is, in logic, the tremendous power of combination; in history the whole course and origin of English law; in morals the fact that of all our English law this law recognizes most profoundly the necessary conditions of individual liberty and well being, as well as the principles of the moral law.

Now from the very earliest statutes I shall quote, when the danger of powerful oppressors, combinations of great men against small was recognized and prohibited, to the most modern decision on the boycott or blacklist based on the unwritten common law, we have had the intelligence

to recognize and restrain this huge power of combination. Through most of Balzac's novels runs the plot of a combination of only thirteen men and women, who, by the mere fact that there are thirteen combined became all powerful in the political, the social and the criminal world. And it is not sufficient that we forbid such combinations to effect crime. Such concerted action to the injury of an individual in his trade, or even of his good repute may amount to the destruction of his fortune or his happiness. You cannot combine to injure another, even without violence or crime. That is our great principle. I can, of course, dislike a man, I may even wish him ill;¹ I may refuse to buy bread of a baker; I may perhaps advise my friends not to buy bread of him; but when I call a meeting of many or all the inhabitants in my town and we all agree not to trade with him, our united action amounts to the absolute ruin of the baker in question.

I hope I have shown that the law of aggregation, of the action of a multitude and of the possession of many, perhaps to the point of monopoly, is and ought to be different from the law governing the single individual. If I have not done so it is of little use to cite authority; but I will mention that the very latest and certainly not the least profound of our English writers on this subject recognizes fully the position I take. I refer to Professor Dicey of Oxford. He, in his most recent book, *Law and Opinion in England*, at the very outset of his appendix (which, as Mr. James Bryce once remarked, like a German foot note, is often the best part of a book), puts first and foremost this subject, which he calls "the right of association." It is fully discussed in his text from which I shall only quote two sentences:

"Whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things,

¹ A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards. Holmes, *The Common Law*, p. 110.

differs from the individuals of whom it is constituted. . . . A body, moreover, created by combination,—a natural corporation, if the expression may be allowed,—whether a political league, a church, or a trade union, by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders. Its combined power is created by some surrender of individual liberty on the part of each of its members, and a society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately; a disciplined regiment of a thousand men, acting under command, is a far more formidable assailant than a thousand men who even though armed, act without discipline and combination.”

And in the appendix he says, still more clearly³ that the right of this exercise of the power of association

“raises difficulties in every civilized country. In England, as elsewhere, trade unions and strikes, or federations of employers and lock-outs; in Ireland, the boycotting by league and societies of any landlord, tenant, trader, or workman, bold enough to disobey their behests or break their laws; in the United States, the efforts of mercantile trusts to create for themselves huge monopolies; in France, the real or alleged necessity of stringent legislation in order to keep religious communities (*congregations religieuses*) under the control of the State—in almost every country, in short, some forms of association force upon public attention the practical difficulty of so regulating the right of association that its exercise may neither trench upon each citizen’s individual freedom nor shake the supreme authority of the State. The problem to be solved, either as a matter of theory or as a matter of practical necessity, is at bottom always and everywhere the same. How can the right of combined action be curtailed without depriving individual liberty of half its value? How can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the Government? To see that this problem at the present day presents itself everywhere, and has nowhere received a quite satisfactory solution, is of importance.”

The importance of this English law of combination is well shown by the fact that the great mind of Napoleon I, or the men he chose to draw the French code, adopted it in full; so far back as 1820 Dane’s Abridgment, printed in Massachusetts, tells us that the English law of conspiracy was made French law by the code of Napoleon. Now, what is this law of conspiracy? It is that a *combination of many, not only to commit a crime, or to attain a lawful object by unlawful means, but even a purpose ordinarily law-*

² P. 153.

³ P. 465.

ful for one acting alone, if to the injury of a third party or the State—to the hurt of the public, or to the coercion of another in his lawful right—is unlawful, void, a criminal offense, and (where such third party or the public is in danger of irreparable injury) may be enjoined in a court of equity; and where it differs from all other common law of private right is in this—that the obnoxious purpose need be, not a criminal offense, but merely a moral wrong.

THE OLD LAW OF CONSPIRACY.

The great volumes of Statutes of the Realm begin with Magna Charta as promulgated by Henry III, A. D. 1217; although they also print the Charter of Liberties of Henry I, A. D. 1101, the charter of Stephen, A. D. 1107, and of course the original charter of John, A. D. 1216. Magna Charta contains no special reference to the law of combination; which is natural, as it was but a treaty between the King and his individual subjects. The law of conspiracy is commonly said to be first formally recorded in the Statute concerning Conspirators, of uncertain date; sometimes associated, however, with the statute against Champerty which dates from 33 Edward I; that is to say, 1305. This is early enough to show the respect to which this ancient law is entitled; for no statute of importance preceded 1305 except the great code of Westminster I and the statute of Mortmain. Cobbett in his history of the English Parliament makes no reference to this statute, not realizing its importance. It is indeed only aimed at conspiracies with the object of maintaining law suits, but nevertheless it is a criminal statute, and the word “engine,” that is to say, fraud, is used in the preamble, thus establishing from the very start that a combination with a perfectly lawful purpose (for a lawsuit is, of course a lawful purpose), but with the intent to injure someone, as by a lawsuit based on a false claim, is a criminal offense; and furthermore that the intent is material. A special writ is given, entitling it a plea of conspiracy and trespass; and “if any man be

convicted under such writ he is to be imprisoned until he hath satisfied the party aggrieved and paid a fine to the King." Note that it refers to conspiracy as an offence or action already well known in the law. Like all early statutes it probably merely imposes a new and severer penalty on a common law offense and is irrefutable evidence of what the law already was. But five years before this, 1300, the Articles upon the Charter, of the 28th Edward I, state that the King hath provided a remedy against "conspirators" by special writ. There is no definition of the phrase, so it is quite clear that it was familiar and well understood in the year 1300. Then in 1330, the 4th of Edward III, the preamble of Chapter 11 says: "divers People of the Realm, as well great men as other, have made Alliances, Confederacies, and *Conspiracies* to maintain Parties, Pleas and Quarrels, whereby * * * some have been destroyed, and some *for fear to be maimed and beaten durst not sue for their Right* * * * to the great hurt of the People and Common Right." A substantially fair definition of the modern wrongful boycott. Fourteen years later another statute speaks of conspirators and confederators, and gives the writ of exigent against them. Then the first great statute of the Staple, 1353, states the law to be: "ordained and established that no Merchant or other shall make Confederacy, Conspiracy, Covin * * * or evil Device * * * to the * * * Disturbance, Defeating or Decay of the said Staples;" that is to say, there must be no combination in restraint of trade at a staple town or in the staple market. The word "Covin" implies *intent*. Finally, that the history be made quite complete, having already got our conspiracy in restraint of trade, we now have a statute recognizing conspiracy in labor matters; by the 34th of Edward III, Chapter 9, A. D. 1360, certain wages are fixed, and "all alliances and Covins of Masons and Carpenters, and Congregations, Chapters (that is to say, trade unions), Ordinances and Oaths betwixt them made or to be made, shall be from henceforth void and wholly annulled; so that every

Mason and Carpenter of what condition he be, shall be compelled by his Master to whom he serveth to do every work that to him pertaineth to do, or of free stone or of rough stone; and also every Carpenter in his degree; but it shall be lawful * * * * to make bargain or covenant of their work in gross,"—that is to say what we should call piece work, or contract work, is allowed.

We thus see the whole law of combination as I have stated it completely set forth in statutes of the Fourteenth Century, between the years 1305 and 1360, and we have a perfect example of a statute aimed against, first a conspiracy to maintain a lawsuit; then against a conspiracy in restraint of trade, the origin of the criminality of the modern trust; and finally, against a conspiracy of laboring men, with a quite satisfactory definition of the boycott and its evils. Only, with true modern leniency, the laborers "shall not be punished by fine and ransom;" although indeed they may be imprisoned if they refuse to work, according to the Statute of Laborers; that is to say, conspiracy of laborers is not made a criminal offense, but only null and void in the law, and—injunctions not then existing—a remedy for enforcement somewhat similar to the injunction is provided.

Blackstone wrote on this matter with substantial correctness, although it is apparent that he did not take the pains to study these early statutes. His ultimate definition is found in his book on criminal law, Vol. 4, p. 136. He speaks only of conspiracy to indict an innocent man of felony, and mentions that there must be at least two to form a conspiracy. But Judge Cooley's foot note states the whole common law as shown in Hawkins' Pleas of the Crown—"all confederacies wrongfully to prejudice an other are misdemeanors at common law and indictable accordingly, whether the intention is to injure his property, his person or his character," and "the offense of conspiracy is not confined to the prejudicing a particular individual; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any

act in itself illegal. There are many cases in which the act itself would not be unlawful if done by a single person which become the subject of indictment when committed by several with a joint design''; and he quotes from the Term Reports and Campbell the instances of two or more persons agreeing to hiss an actor at a theatre, by preconcerted plan, or when several unite in a scheme to blast the character of another, though the oral slander of a private individual is not indictable, and the offense depends on the unlawful agreement, and not on the act which follows it. On the other hand it is no offense to conspire to prosecute a guilty person; and this is shown in a better instance than that cited by Judge Cooley, for the earliest instance of conspiracy in the State Trials is that of 1588 where certain adherents of Queen Elizabeth conspired to bring to judgment certain persons adherents of Mary Queen of Scots for combining to dethrone Queen Elizabeth and put Mary in her place. Throughout this entire report, which is extremely interesting, it is perfectly evident that never for one moment do they consider the combination of Queen Elizabeth's friends a conspiracy, while the combination of Queen Mary's friends was so declared, and led to the conviction, and death not only of the persons involved but of Mary herself. In Viner's Abridgement my exact instance is cited, of a conspiracy not to buy bread of a certain baker. The other Justices of King's bench seem to hold that there must be an overt act to make such a combination indictable; but even this is vigorously denied by the Chief Justice.

But if there were any doubt about the ancientness of the law of conspiracy it would be solved at once by the Abbot of Lilleshall case, which was actually decided in 1221, eighty-four years before the first Statute of Conspiracy was enacted; first printed by the Selden Society in 1870, it is a perfect instance of the mediaeval boycott, well worth being quoted in full:

"The Abbot of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclama-

tion to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Peche, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it, and that he never heard any such proclamation made by anyone. It is considered that he do defend himself twelve-handed (i. e., with eleven compurgators), and do come on Saturday with his law."

This is a remarkable report; for in twelve lines (ten lines of the law Latin) we have here set forth all of the important principles of the law of boycott. The Abbot complains that the Shrewsbury people do him many injuries "against his liberty" i. e., the Abbot claims a constitutional right to freely conduct his own business; then we have the recognition of the threat of a boycott as a particularly illegal act: "They have caused proclamation to be made that none sell merchandise to the Abbot." The defendants admit the illegality of their conspiracy, because they deny it as a fact; and the bedell likewise denies that he ever made such a proclamation or threat, whereupon (the plaintiff being a man of the Church) they are set to trial by wager of law instead of by actual battle, neither party nor the court making any question of the illegality both of the conspiracy and of the act complained of.

What is particularly to be noted is that in every one of these statutes and the earliest cases cited, it is the intent that is elemental. And the defendants in the Lilleshall case themselves admit, that were it true they had combined with the intention of injuring the Abbot, it would have been a criminal offense.

MONOPOLY.

The law of monopoly, resting also on combined action with a common purpose, is based largely on the same principles. A great mine of information on this point is to be found in the Great Case of Monopolies, argued in 1684 during many months and reported in full in the seventh volume of State Trials.⁴ All the lawyers who were or be-

⁴ P. 513.

came Chief Justices of England at that time were concerned in this great cause. It was brought by the great East India Company against a merchant, one Sandys, who had freighted a ship for East India ports in contravention, as it was claimed, of the charter of the company granted originally under Elizabeth, which gave them a monopoly of the trade in the Indies. Had the case been decided against the company it would have put an end to the English Indian Empire in India. Sandys defended on the plain ground that the grant was a monopoly in contravention of the common law. The company only sued on the case for one thousand pounds damages, although no specific remedy or penalty was provided in the grant to the company; just as a man might sue today a trust which had injured him, even though no specific damages were allowed by the statute. They won. The court admitted that the common law made grants of monopoly in English trade void, but they said this did not extend to foreign nations, particularly heathen nations; that, as the Crown might prohibit all such trade, to prevent possible corruption of the manners and morals of England by intercourse with heathens, so the King might grant a limited permission or grant the monopoly of said trade to one company, or to certain specified persons. On the other hand, Sandys relied on the old Statute of Edward, 18 Edward III, cap. 3 "that the Sea be open to all manner of merchants to pass with their merchandise where it shall please them"—upon this the plaintiff's demur. Holt, afterwards Chief Justice, made a wonderful argument against the monopoly, curiously modern in thought; much of it indeed might have been quoted in the brief against our Standard Oil company. Here are a few of the interesting matters he cited. First the case of the King against Crispe: "Here was lately an agreement between copperas makers and copperas merchants for the buying of all copperas; and that these copperas makers shall for three years make at so much a ton, and restraining them from selling to others." This was held to be criminal engrossing. But long before

this he cites the case of one Peachy, in the 50th of Edward III, A. D. 1375. Peachy, he tells us, by Royal grant was given a monopoly of selling sweet wines in London; he did so and was punished for extortion, just as if it were claimed and proved that a modern trust sold its goods at an exorbitant profit by reason of its monopoly,—and the Royal grant did not protect him. The case also cites⁵ the famous case of the Tailors of Ipswich,⁶—“A company of tailors made a by-law to exclude tailors from exercising and using their trade within the town unless they present themselves to the masters and wardens of the company and are admitted as members.” This by-law was held void, the court saying—“ordinances for the good government of men, of trades and mysteries are good; but not to restrain any in their lawful mystery;” and they refer even to the monopoly held by physicians, and say—“The patent to the College of Physicians that no person shall practice physic without their license would have been void had it not been confirmed by act of Parliament, yet this concerned not all the subjects of England and is a mystery, and the professors thereof fit to be approved by persons of skill in it.”⁷

Here we have a complete review of the common law of monopoly and of monopolistic combinations both by an individual (Peachy's case), by a company of manufacturers (King against Crispe), by a company of industrial workers, what we should call a trade union (the Tailors' case), and finally by the members of a skilled profession. It is so complete that nothing need be added; and we see that the question of the intention runs throughout them all.

THE MODERN LAW.

So much for the antiquity of the law, but in these days we must be prepared to admit that no law however ancient can be justified by that alone unless it appeals to modern reason. The next thing therefore to consider is what other

⁵ P. 520.

⁶ 6 Coke.

⁷ Williams, *arguendo*, p. 548.

tests of the unlawful combination, either of labor or trade may be imagined; and whether such other tests would on the whole work better than the test of intention.

So far as I am able to find but two others have been suggested: One is the familiar one of the effect or the result, that is to say, if the result be unlawful or against public interest, it may render unlawful the combination bringing it about. Now this precise question was recently asked by one of the Justices of the Supreme Court of the United States to one of the counsel arguing for the government the case against the Standard Oil Company. Mr. Justice White asked Mr. Kellogg whether, if the Standard Oil Company had in fact acquired every oil refinery in the State of Pennsylvania, that fact would have made it an unlawful combination there. Mr. Kellogg for the moment did not give a definite answer, but the Attorney General in his close took up the question, taking the ground for which I contend that it was one of intention and not of result. The old New York anti-trust statute was based upon the latter notion, and consequently was never effectual; it provided in substance (for, being a criminal statute; it had to be construed strictly) that when any combination brought about a monopoly, that is to say, an actual or complete monopoly of a trade in the State of New York, it should be an unlawful trust under the New York statute. As it was obvious that no trade, in fact, ever did succeed, not even the Standard Oil, nor the sugar, nor any other trust, in actually getting a hundred per cent monopoly, that test proved a failure, and no one was ever convicted.

I believe that the question of complete monopoly or the ultimate effect has nothing whatever to do with it except in so far as it may be evidence of the probable intention of the conspirators at the inception of the combination. It is to me perfectly clear that I may obtain, with one or more associates, an actual, complete, impregnable one hundred per cent monopoly, and yet be perfectly within my law; on the other hand I may combine with two or three or more

with the intention of restraining trade, of getting a monopoly, of destroying competitors, and ours will be a criminal combination though we fail in our purpose as rapidly and completely as did some of the earlier trusts, for instance the cordage trust, which only lasted a year or two before it went down in utter smash. If I happen to own, let us say, the only cordage works, at Plymouth, in the State of Massachusetts, except a small concern, let us say, at Newburyport, in the same State, I have a perfect right to buy out my competitor, there being no unfair act committed. I am inclined to think even that I and my competitor may form a consolidated cordage company and, failing evidence to show that we intend then or ever to get a monopoly by fair means or foul, we are within our right; that is to say if our motive is merely that of making a bigger concern or securing a profitable bargain. That motive being perfectly lawful will make our combination lawful. In other words it grows out of the natural relation that I have to my neighbor, whose property I purchased. And this brings me to the third and most modern test, which I mention merely because it is advanced in the most recent text book, the work of Mr. Cooke of New York—Combinations, Monopolies and Labor Unions. In his preface he rejects the old test, for which I am still contending, of intention; but it appears from the context that he objects to it principally because it has been repealed by the modern English statute, the Trade Disputes Act of 1906. Now what we may do by statute is one thing. Mr. Gompers has been trying for thirty years to get that English statute and its predecessor, the Conspiracy and Protection of Property Act, 38 and 39 Vict. c. 86, adopted in the United States, but has only succeeded in the States of Maryland, California and Oklahoma. His bill to adopt the English statute has been pigeon-holed in Congress for a generation. However, he is entirely within his rights in leading the agitation, and we may, of course, enact such statute yet if we deem it wise, and if the statute would be constitutional. Fortunately or unfortunately it would not

be, for it is the clearest kind of class legislation; and that I take to be forbidden, expressly or impliedly, in every State Constitution in this country, except perhaps that of Oklahoma, as well as by the clear implication of the Fourteenth Amendment.

The point we are discussing is not whether we should alter the ancient common law of combination, or whether such alteration would be constitutional, but what the law in fact is, and whether it is a reasonable law today. Now Mr. Cooke advances the test exploited by the famous case of the *Mogul Steamship Company v. McGregor*—"the natural incident or outgrowth of some lawful relation," and he says the three relations he specially considers are those of trade competitor, of employer, and of employe. In his lack of interest in our "mass of anti-trust legislation" as clumsy and unnecessary, I have every sympathy, for I hold it to be unnecessary, and we both hold it to be clumsy; but when he calls the common law also clumsy and a worse than useless medieval survival, I cannot follow him. Yet I do not feel that we are so far apart, in fact only that we do not give the same reasons for our opinion. I think the common law theory, or what I believe to be the common law theory, arrives at the right result, by saying that a combination, to quote Mr. Cooke's words, which arises naturally out of a relation of trade, such as the purchase of an adjoining business, is lawful, for the very reason I have alleged; that its first motive is the necessary development of business, arising naturally and normally, and that the indirect result, of restraining trade, or even getting a monopoly of it, is not the *first* thing contemplated, and consequently not, under my test, the intention of the combination. This I take it to be the law of the *Mogul* case. It was English law in the twelfth century, and it is American common law today.

THE PRESENT QUESTION.

Having thus stated the thesis which I wish to defend, I will ask now, consider first, the past history of our laws;

then the reported cases, and finally pass to apply our test to the great questions of today. I have already said that I stand by the old common law test of intention, intent; a test neither unusual nor difficult for a jury to apply, for it is universal in the criminal law, substantially recognized in Mr. Justice Holmes' book on the Common Law, and universally, I think, recognized in the oldest evidence of the law we really have—namely, the very old statutes of England. For the Reports of cases begin one or two centuries later, and we must always be on our guard against the tendency of judges to be over-learned, to base the English common law upon the logic of the mind rather than the logic of events, and most of all to impart into England the Roman law. I could show statute after statute in Anglo Norman reigns which is aimed against the Roman law, and even against the Courts of Chancery and the Church Law, its off-shoots, and even a statute which forbids the Roman law to be cited in the courts; another which complains of the number of Italian clerks, (clerics) brought into England and of their teaching; and finally at the beginning of every reign, each king solemnly promised that the English law, that is, the law of Edward the Confessor, should be restored, and should be recognized independently of any Roman innovation. For the Roman law was only rediscovered to the word by Pisan pirates at Amalfi in 1135, and of course, this wonderful system spread among the learned and dazzled them with its logic. So that judges in rendering their opinions from the bench delighted in finding a reason, logic, and a Roman law basis or precedent for the very oldest institutions of the Anglo Saxon common law. And this has lasted down to modern times. There are plenty of learned writers, the successors of Austin and others, who still so maintain. Spence, even, admits that modern English law is almost as much Roman as English. But the only point I wish to make is that we must beware of the subtleties of judges in their opinions; and perhaps of that school which seeks to find in all cases a deep law logic reason for

an ancient customary law. Even the book of Mr. Justice Holmes, perhaps our leading writer on this subject, and the more recent book of Professor Gray, give many pages to profound speculation and analysis of the logic of decisions; but the early common law did not grow that way. It was the ancient and customary law of the people; the evolution of the totality of their lives and customs, only in comparatively recent times it became subject to the accretion of mere judicial opinion and of "judge-made law."

The common law, therefore was that a conspiracy, an unlawful combination, is a combination of two or more persons (and they must be two; it has been decided that a husband and wife cannot form a conspiracy) (1) with a criminal or unlawful purpose, aim or intention; (2) or a lawful purpose, which by intention, or necessarily, has to be attained by unlawful means; or (3) for a purpose morally wrongful as is the injury of a third person or the State. And no overt act alone makes a conspiracy nor is one necessary to a conspiracy, except merely as evidence under the last two varieties, that is of a combination intending unlawful means or merely wrongful ends. It is, of course, this question of the moral purpose, the not doing unto others as you would not be done by, that is the very distinction, it seems to me, of this English law; a distinction so high that it has been admired and copied into the codes of most modern civilized countries as completely as the institution of trial by jury; and this principle is not based upon recent cases alone. I have no intention of going into the thousands of decisions upon the modern strike, the boycott or the blacklist, or the acts of intimidation and picketing, or the combinations in restraint of trade. But I will mention what appear to be the boundary cases, for we know it is the nice decisions, the border cases, that draw the line of the law.

I assert that in this law of combined action, the law goes into the domain of morals and of high constitutional right, and that it ought to do so. The opponents of the theory base their opposition on the fact that the law does not do so in

similar cases of individual action or possession—which I admit. The friendly critic might ask, why not? To this I can only answer that it is practically impossible for the law to refine upon private motives to this extent. Where an individual commits an act that is criminal the law can find him guilty; when he commits a tort upon his neighbor, it may give that neighbor damages and the very fact that this already is going a step farther is shown by the far greater difficulty that law of tort gives to Holmes,⁸ Gray and other students of the logic of the law than the question of crime; but when you go beyond even tort, which after all is a definite tangible injury to a definite person under old common law theories of personal trespass or negligence, and come to that injury which is mere malevolence accompanied by an action otherwise perfectly lawful, it is a matter for the priest, for the confessor, for a man's conscience not for the law. A simple example again is, of course, my engaging in a trade or in refusing to trade with some individual; in both cases really for the purpose of injuring that individual, but otherwise entirely within my lawful rights. My act, in other words, on its surface lawful and regular, deep in my conscience is dictated by hatred. The law cannot go into one man's conscience; we have been claiming only that it might, or that a jury might, judge of the con-

* "Our system of private liability for the consequences of a man's own acts, that is, for his trespasses, started from the notion of actual interest and actual personal culpability." *The Common Law*, p. 4.

It is important to note that this law of conspiracy has no connection whatever with the common law of tort; that is to say, it springs from another and a different root; it is indeed more ancient doctrine than that of torts, which did not assume its present shape before the fourteenth century. The earliest case of tort I find in Professor Ames' collection dates only from 1348. The notion of responsibility of a person for a tort not amounting to a crime

in a court of law is, therefore, considerably later than the doctrine of conspiracy, as shown at least in the Statute of 1305 if not before.

Certain modern cases quoted in the text (and a few more might be added) lean strongly to the doctrine that an individual may recover damages from another individual for an act otherwise lawful, but prompted solely by malice. There seems to be a sudden development of the law that way; but such was not until today (if it be today) the law. The writer makes no plea for such a change; all the doctrine contended for in the text is confined strictly to the law of *combination*.

sciences of two or more persons working together; for the *object* of their getting together is a matter of which a jury well may judge.

Yet there are cases which come very near to this—extreme cases of individual action; and I will mention four or five; one very old and the others very modern. No better case illustrating my doctrine of combination can be imagined than that one in the State of Ohio, decided only last year, when a number of persons combined to draw their deposits from a bank on the same day for the purpose of breaking that bank, and that purpose having been duly found by the Court or a jury, it was declared a conspiracy. Of course the law is a creature of common sense besides custom, and while all conspiracies are in my opinion technically criminal, it is conceivable that they will range all the way from those highly so, down to those where a criminal punishment would hardly be imposed. The law will rest content with a civil suit for damages or even, as in the anti-trust common law of England, with merely declaring the combination void at law, such as all contracts which were simply in restraint of trade. But there are cases which almost seem to apply this law of unmoral purpose to individual action. First of all is the very old case of *Tarlton v. McGawley*.⁹ That was a case where a slave trader having his ship off the coast of Africa had collected a tribe of negroes upon the beach for the purpose of enslaving them; but a competing slave trader came up with another vessel, and in order to destroy his competitor's trade fired a cannon with the intention of scaring the negroes on the beach so that they ran away into the woods and escaped. One or two were killed or injured but there was no trespass committed upon the defendant. The point that slave trading was an immoral occupation in itself was of course not raised in those days; yet this perfectly lawful act was held to give the owner of the first vessel the right to damages when he got back to London.

⁹ Peak, N. P. C., 270.

Wyeman v. Deady¹⁰ was a Connecticut case where the plaintiff got damages against defendants for procuring his discharge by intimidation of the employer. The element of conspiracy was said by the court not to be in the case. So in Brennen v. United Hatters,¹¹ the plaintiff recovered damages from the Hatter's Union because he refused to pay the fine and they took away his membership card which resulted in his discharge by the employer, and the court got to the length of saying that malice is the intentional doing of a wrongful act without justification and a wrongful act is an act, which in the ordinary course will infringe upon the rights of another. But perhaps the most extreme modern case, almost going back to the old case against McGawley, that of the slave trader, is the Minnesota case of Tuttle v. Buck,¹² where the defendant, not a barber, but a banker, established another barber in the town for the purpose of competing with the plaintiff, who had been for some years established as a barber in the same village. It was alleged that this was done with the sole purpose of destroying the plaintiff's business, and not for any legitimate interest of the defendant, and the plaintiff, although the court was evidently in some doubt, got damages under a divided opinion. Finally there was also a Louisiana case where the proprietor of a bar-room recovered damages against the superintendent of a street car line for advising the car conductors and drivers not to patronize his saloon.

These are examples of cases brought against individuals not in conspiracy which seem to me to go to the extreme limit of the law.

Let us now close by applying our principle to modern cases of combination; one of labor and one of capital. If our test is of any value it should stand application to the very most recent and most important controversies now before the public, and we will take as examples—but merely as examples, for the cases are still *sub judice*—the great

¹⁰ 65 Atl. 129.

¹¹ 65 Atl. 165.

¹² 119 N. W. 946.

Government suit against the Standard Oil Company on the one hand and the contempt process against Messrs. Gompers, Mitchell and others in the Buck Stove and Range case at Washington, D. C., on the other.

In the first place we must recognize that serious difficulty arises from the fact that we are acting under a statute, at least in matters of interstate commerce, the Sherman Act of July 2, 1890. At common law a combination in restraint of trade or a monopoly by royal grant were both void; no contract under them could be enforced; and by the Statute of Monopolies any person injured might bring a common law suit and recover treble damages; indeed it appears from the East India case that this was common law without the statute. No machinery of governmental interference was provided; the tremendous power of the government was not employed like a club to destroy the business and all that it represented; it was always, under common law principles, a law suit between individuals.

The contract or combination might indeed be held void as against the suit of any third person aggrieved, or against the defense of a party refusing to be bound by it, but there the matter ended. Now our Sherman Act goes beyond the common law in two particulars: First, the familiar one that on its face it forbids *all* contracts in *any* restraint of interstate commerce, even a reasonable one; and secondly, and quite as important, that instead of leaving the matter to individuals it is made the duty of the Government, through any District Attorney, to institute proceedings in equity to prevent and restrain such violations.¹³ All property owned under any such contract or combination, being transported from one State to another or from a foreign country, may be seized and forfeited; and then follows the common law provision of treble damages to the individual injured.¹⁴ It is furthermore¹⁵ made a misdemeanor for any person to engage in such combination or make such

¹³ Sec. 4.

¹⁴ Sec. 7.

¹⁵ Sec. 3.

contract. The Act, of course, applies to corporations and is called "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." Section 1 names particularly contracts in restraint of trade, and punishes persons engaged in such; and section 2 is addressed to persons who monopolize or attempt to monopolize or combine to monopolize any part of such interstate trade. It was apparent in the argument before the Supreme Court that both bench and bar had some difficulty in seeing what new thing section 2 added to section 1, and yet they were bound to find such additional meaning if possible. Where the statute transcends or contradicts common law is well shown in section 1 where "every contract, combination or conspiracy in restraint of trade" is denounced. But a combination in restraint of trade is by the definition of the common law a conspiracy, so this is tautologous, while the words "every contract" in section 1, with the words "any part" in section 2, have forced our courts to denounce contracts in restraint of trade, or combinations, which at the common law would have been reasonable growth and not monopoly.

But to my mind the innovation of the remedy is more important still. Mr. Johnson, in arguing for the Standard Oil Company, urged at least that they be punished only for what they had done wrong, and not totally destroyed. But the sledge hammer of government prosecution can not stop short of destruction. No other penalty is provided. And a still more important consequence of using this direct prosecution by government in a court of chancery is that there is no jury trial of the facts in the locality where they happened. It practically comes to an attempt by the Supreme Court to decide what is peculiarly a question of fact, on a written record, which did indeed, I believe in this case, amount to twenty-seven printed volumes. But the question of intention and of the reasonableness of ordinary business matters is peculiarly adapted to be tried by a jury of the people in the locality affected. Under the Sherman Act our

highest tribunal is deprived of this assistance. Furthermore the difficulty of discriminating between "good trusts and bad trusts" is enormously more difficult for a high court of appeal in a hearing on a bill in equity than it is for a jury in a common law suit for damages. However, leaving the essential difficulties of interpreting this Act of Congress with this brief mention, let us now try to apply our test,—which is after all I think, the test intended by the Sherman Act as I believe it to be,—the test of the common law.

In the Standard Oil case the question would be—was the combination actually complained of in this suit (which might, of course, be the original Trust agreement, or a later combination of corporations, or, finally, the articles of association of the Standard Oil Company of New Jersey itself) created with the intention and the aim of restraining trade in any of the many forms of such restraint, as by fixing prices, limiting output, parceling territory, or even unfair competition, the destruction of competitors by artificial underselling, or, finally, with the intention and aim of establishing a Federal monopoly. No amount of reasonable acquisition without such malign purpose and with no evidence of any malign act, no amount of acquisition of more refineries, pipe-lines, fleets of ships, would in this test of itself amount to evidence of a criminal combination; even though the result, either by larger ownership or greater ability, might in fact be to get a very large percentage of the business of refining and shipping oil. On the other hand, if the jury found,—and now the Court must act as a jury,—that the intention of the contract or combination or charter complained of was to bring about a national monopoly (and any one of the above enumerated acts of restraining trade would be evidence of such intention), then a jury might find the contract or combination void; and so a State court, of intra-state combination, under the common law.

It is of course possible, if not probable, that our high court has no doubt of the law, but it is more than likely

that they have a doubt of the facts, sitting merely as an appellate court of chancery with no jury to aid them.

Coming now to the Buck Stove case, the same principles apply. I leave out that part of the argument of counsel for Mr. Mitchell and Mr. Gompers, which is based on the claim that their right of the freedom of the press is infringed, for that brings up merely the constitutional question of whether the freedom of the press in our written constitutions means more than, as in England, the right to publish without preliminary censorship, being responsible for such acts of publication in the common-law courts, in any ordinary way. It is lawful, for instance, to walk upon the highway, to exercise the right of free locomotion, yet there have been many injunctions where a congregating upon highways, or even the right of free locomotion in certain places, has been restrained. But the test of intention, it seems to me, works as well here as in the other case. The plaintiff claims that there is a combination to boycott his business, with one overt act. The evidence of such combination is the printing of his name weekly on the "Unfair List" of the official journal of the Federation of Labor, coupled with the expressed intention of going on so to print it in every journal until the plaintiff yields. The first question is simply whether there was a combination with the intention of controlling the plaintiff's lawful liberty, and of injuring, boycotting or destroying his business. That fact seems to be admitted; then the same question will arise as to the intention of the publication which is the cause of the sentence for contempt. Mr. Gompers himself asked me whether he had not the right to print the fact that there was a trade dispute with the Buck Stove Company in his own newspaper as part of his right to freedom of the press; I said "certainly you have. You can print it once at least as matter of news; you can doubtless comment upon it in your editorial column; but when you print it in every issue for a year or five years, and moreover, state that you intend to go on printing this Unfair List until the Buck Stove Com-

pany yields, it will be a question of fact whether you are printing that as matter of news, or as a threat, a boycott; the act of a combination with an unlawful aim. It may be difficult for us, for you and me or for lawyers to decide, but such cases are very often much more simple to a jury of common-sense men. Go before that jury if you can. If they hold that it is a matter of recurrent interest, of news, that you should print every week a story about this trade dispute, they will so find. If, on the other hand, they see that it is part of an organized attempt to destroy the plaintiff's business, especially when coupled with a threat of continuing this printing forever in the editorial column, and not mere matter of news, they will probably find the other way.

I conclude, therefore, that we should think long and carefully before we abandon this great principle of our English law preventing the oppression of the individual by the multitude, and, in the law of combination, going directly to the ethical motive of the combine. It has been a commonplace of laymen critics that the law is not moral,—that it does not go into the higher issues,—that it is easy to keep within the letter of the law while morally guilty to one's neighbor or to the State. This is *not* true of our law of combination. Let us, therefore, not carelessly give up this one great domain of the law of private right, which, based both on our English history and the profoundest laws of economy at the same time, rises to the highest standard of duty to one's neighbor and to the State; the one great body of the common law based squarely on the Golden Rule.

BOSTON, MASS.

FREDERIC J. STIMSON.

THE GROWING DISRESPECT FOR THE LAW.

That there is a growing disrespect for the law is patent to all observers. Leading newspapers of the country barely miss a daily editorial criticism of the inefficiency of our legal system. Magazines make the law and its administration the subjects of their popular assaults. Judges, lawyers, distinguished teachers of the law, sociologists, publicists and philosophers, as well as merchants and laborers and the man on the street, join in criticism and denunciation of our courts, the Bar, the law and its administration. President Taft, against whom no one has brought the charge of radicalism, a man whose whole career has been identified with law, who won his highest honors and distinction as a federal judge, his father an able judge before him, has made criticism of the law and its administration the serious subject of the times. In a speech which he delivered in Chicago on September 16, 1909, he said:

"There is no subject upon which I feel so deeply as upon the necessity for reform in the administration of both civil and criminal law. To sum it all up in one phrase, the difficulty in both is undue delay. It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization and that the prevalence of crime and fraud, which here is greatly in excess of that in European countries, is due largely to the failure of the law and its administration to bring criminals to justice.

"But reform in our criminal procedure is not the only reform that we ought to have in our courts. On the civil side of the courts there is undue delay, and this always works for the benefit of the man with the longest purse. What the poor man needs is a prompt decision of his case, and by limiting the appeals in cases involving small amounts of money so that there shall be a final decision in the lower court, an opportunity is given to the poor litigant to secure a judgment in time to enjoy it, and not after he has exhausted all his resources in litigating to the Supreme Court.

"Of all the questions that are before the American people, I regard no one as more important than this, to-wit: The improvement of the administration of justice. We must make it so that the poor man will

have as nearly as possible an opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact."

And in his annual message to Congress, the President said:

"In my judgment, a change in judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the despatch of business and final decisions in both civil and criminal cases, constitutes the greatest need in our American institutions."

A by-product of the unanimity of criticism, and significant as reflecting the resulting popular regard for lawyers, was recently conspicuously manifested when a certain public character, ambitious for further political honors, as a means of his own advancement, made a point of the fact that a large proportion of the members of the President's Cabinet are lawyers and that all of them had been the attorneys for large corporations. No charge was made that they had been dishonest, but the simple fact that they had reached such eminence in the profession as to win the recognition of large and important interests, was set forth as a mark of discredit to them and as evidence that the government was entitled to popular disapproval for utilizing their talents for the public service. The suggestion implied is either that all lawyers are untrustworthy, or that lawyers as soon as they win distinction become so, and forfeit the right to be of public service. Such a suggestion could not have been made with any hope of the desired effect had not its author felt that the legal profession had come into popular disfavor. That the legal profession has lost much of its ancient prestige is painfully apparent to every member of the bar. This loss must be charged in large part to the indifference with which the legal profession, including the judiciary, has permitted the law and its enforcement to decline into its present inefficient state.

There is no room for the law in a democracy unless it accomplishes the will of the people. As an institution

requiring respect and unqualified homage, it must be an efficient instrument for the furtherance of public good. That it falls far short of attaining this ideal is obvious. Just as in the administration of public affairs, the cry throughout the nation is against the vested advantages of the privileged few, and the deliberate disregard for the welfare of the mass, so there is now a growing feeling that the law in some respects on its substantive side, but chiefly and altogether on its administrative side, has come to be the instrument of power in the hand of "him who hath" as against the welfare of society as a whole. Therefore it becomes the work of the lawyer, who is inspired by the traditions of his profession, who chose it as his own not merely through his commercial instinct, and who is not content to spend his life as a parasite on a decadent growth, to examine into our jurisprudence and to find remedies for the evils that have come to it.

Throughout English history, the common law was the popular safeguard against the encroachments of tyranny upon the rights of the people. The great contests with the crown were to preserve the liberty of the individual citizen. Magna Charta, wrested from King John at Runnymede, the Petition of Rights forced from Charles I, the Habeas Corpus Act passed during the reign of Charles II. and the Bill of Rights, adopted during the reign of William III., all of them were declarative of the common law insuring the rights of the citizen against the usurpation of the government. Always was the common law on the side of the people. Economic conditions down to very recent times gave the people nothing to concern themselves with save their private individual personal rights.

This historical theory of the common law is thus expounded by Blackstone:¹

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the gen-

¹ Commentaries 139.

eral good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps, be extensively beneficial to the public, but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights."

The popular notion today differs very radically from this individualistic view of the purpose of the law. The complexities of modern social and industrial life have necessitated a shifting from individual rights to the common welfare. The law in its persistence for individual rights has failed to adapt itself to the greater interests of society as a whole, and therefore, now for the first time in its history, the law is not regarded by the people as an institution primarily for their benefit and welfare.

The tenacity with which courts have clung to this individualistic conception and have consistently refused to perform their part in the general movement for social betterment, has undoubtedly irritated the people and provoked popular dissatisfaction. Popular tolerance of the law has been severely strained by the application to modern industrial conditions of the fellow servant rule, the doctrine of contributory negligence and the doctrine of assumed risk. So intrenched have these theories become in the modern law of torts that it would be practically impossible to circumvent them, even if it were thought desirable to do so. The people, who after all have it in their power to dictate what the substantive law shall be, are now beginning to compel legislative consideration of the evils of modern industrialism in so far as it affects human life and health. Workmen's compensation and employers' liability acts and industrial insurance will soon find their way into our legislation, as they long ago have done in other civilized countries, and the hardships of the application of the old com-

mon law of master and servant to present conditions will soon be ameliorated.

Another branch of the substantive law that is responsible for much of the popular dissatisfaction is the law of liberty of contract. Into the constitutional formula that no person shall be deprived of life, liberty or property without due process of law, there has been construed, as being a part of liberty and of property, the right freely to make contracts, including the contract of employment. Though courts have held that when the public good justifies it, legislation may impose restrictions upon this constitutional safeguard, they have, with recent refreshing exception, deliberately overlooked the public good when passing on statutes affecting the rights of workmen. Rather, with respect to what has been styled social and labor legislation, courts have usurped the constitutional discretion in the legislature to determine whether an act tends or does not tend to protect the public health, safety and welfare. Thus, statutes limiting the hours of employment, fixing the periods at which certain classes of laborers shall receive their wages, prohibiting the practice of fining workers in cotton mills, regulating the measuring of coal for the purpose of fixing the compensation of miners, prohibiting the payment of wages in store orders, preventing employers from prohibiting employees from joining or retaining membership in trades unions, have been held unconstitutional, on the ground that they interfere with the freedom of the individual to contract for his labor in any way that he sees fit. It is not intended here to discuss the merits of this class of legislation. The point here is that such legislative enactments express the will of the majority in the manner provided for such expression under our constitutional and representative form of government. For the courts to vitiate the solemnly enacted will of the people, except in case of palpable violation of a clearly and specifically expressed constitutional limitation, is to set themselves

up as superior in wisdom to the people whom they are established to serve. It tends to the destruction of a democracy of people and to the creation of an oligarchy of courts, the final arbiters of what is good for the people being not the people themselves, but the judges whom they have chosen.

Evidence of the harm done by courts in their assumption of superiority over legislatures in the determination of the public welfare is plentiful and striking. The Supreme Court of Colorado, in the case of *Re House Bill 203*,² advised the legislature that a bill providing for the weighing of coal at the mine in order to fix the compensation of miners, was not in accord with the State or Federal Constitutions. That the court was mistaken so far as the Federal Constitution is concerned was demonstrated by a decision of the United States Supreme Court,³ in the case of *McLean v. Arkansas*, where a similar statute was held to be a proper exercise of the legislative function and in harmony with the Federal Constitution. But the decision of the Colorado court was followed by strikes and disorders due to attempts to secure by force what could not be had by law.

The extent to which courts have gone in maintaining that legislative restrictions upon the freedom of contract are a violation of personal liberty is doubtless largely due to the training of lawyers in the ancient individualistic conception of the common law. Here and there a newer and more popularly acceptable spirit has broken in. Judge Werner of the Court of Appeals of New York in the case of *People v. Strollo*,⁴ uses the following language:

"Under a judicial system which has for centuries magnified the sacredness of individual rights, there is much less danger of doing injustice to the individual than there is in overlooking the obligations of those in authority to organized society."

The public has no respect for those decisions of our courts that are based on the theory that an employer and

² 21 Colo. 27.

³ 29 Sup. Ct. Rep. 206.

⁴ 191 N. Y. 42, 59.

an employee, under the present day conditions of industrialism, have equality of rights. Courts lay this doctrine down in all solemnity while everyone knows that the laborer in the mills and in the mines and the women and children in the factories must accept employment under whatever conditions the employer may choose to impose, or join the army of unemployed and throw those dependent upon them upon the mercy of public charity. That courts made up of intelligent men should fly in the face of the practical conditions of inequality makes it difficult to win for the law and to hold the respect of the working people of the country so essential to the preservation of peace and order.

This difficulty is all the greater because it is known that in legislative restrictions on contracts other than those affecting the health and welfare of working people courts find no violation of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law.

Our usury laws and our insurance laws have always been sustained by our courts on the ground that they have been adopted to prevent fraud, imposition or oppression. In *Karnes v. American Fire Insurance Company of Philadelphia*,⁵ Judge Williams rendering the unanimous decision of the court, at page 417, says:

"It can not be claimed that parties have the right to make any and all contracts they deem proper. The state has made and may properly make many regulations that will restrict this right. For instance, we have usury laws and their validity is unquestioned. Parties are not permitted to insert certain conditions in insurance contracts which would be perfectly legitimate, but for statutory prohibition. Yet the courts sustain these provisions and declare ineffectual any attempt by contract to evade or nullify the statute."

This discrimination by our courts against legislation intended to protect the working people against fraud, imposition and oppression cannot fail to have a very serious

⁵ 144 Mo. 413.

effect. Miss Jane Addams, the great sociological authority, says in 13 *American Journal of Sociology*.⁶

"From my experience, I should say, perhaps, that the one symptom among workingmen which most definitely indicates a class feeling, is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side."

According to Professor Roscoe Pound in his exhaustive discussion of this subject in an article entitled "Liberty of Contract" in the *Yale Law Journal* of May, 1909, this doctrine of liberty of contract, as it now is construed and interpreted by our courts, is a new one and the first decision turning upon it was rendered in 1886. But, though it is a new theory, it promises to be short lived. Already it shows signs of breaking down. Not that there is any change in the constitutional formula that no person shall be deprived of life, liberty or property without due process of law, nor in the principle that this includes the freedom to contract. But there is a shifting by the courts of the emphasis from the principle of the individual freedom of contract to the principle that such individual freedom to contract is subject to legislative restriction in the interest of the public good. The agitation for more democracy as evidenced by the newly adopted political machinery of the initiative and referendum and direct primaries, the resulting responsiveness of legislation to popular demand, the general feeling that this shall be in fact as well as in name a government by and for the people, will influence courts to permit legislators to exercise the discretion, vested in them by the Constitution, to determine what the demands and needs of the public welfare may be.

The United States Supreme Court has been much more progressive than the State courts on this subject. The case of *Lochner v. New York*,⁷ though an exception in that it holds the reactionary view, gives us a dissenting opinion

⁶ P. 772.

⁷ 198 U. S. 45.

by Justice Holmes that ought to blaze the way for courts to see the interests of the people in a clearer light. That case by a bare majority held that an act limiting the hours of employment for bakers was unconstitutional. Justice Holmes, dissenting, said:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that State Constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical as this, and which equally with this interfere with the liberty of contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

After referring to some of the laws restricting the freedom of contract which the court had sustained, Justice Holmes proceeds:

"Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody any particular economic theory whether of paternalism and the organic relation of the citizen to the State, or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it proper on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work."

The rule that commends itself to popular approval is well stated in *McLean v. Arkansas*,⁸ where a statute regulating the weighing of coal at the mine so that the compensation to the miner may be determined more equitably,

⁸ 29 Sup. Ct. Rep. 206.

was upheld as a proper exercise of the legislative function on behalf of the public welfare. The court said:

"The mere fact that a court may differ with the legislature in its views of public policy or that the judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . . If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose or because it is thought to be an unwise exercise of the authority vested in the legislative branch of the government."

In the recent case of *Ritchie & Co. v. Wayman*,⁹ decided by the Supreme Court of Illinois, in April last, by which the court in effect overruled a prior conflicting decision,¹⁰ a statute limiting the hours of employment of women was upheld as constitutional on the ground that the health of women was an essential factor in the preservation of the virility of the race. Courts now generally permit legislatures to regulate the hours and conditions of labor of women and children and to that extent at least are veering away from the narrow construction of the constitutional formula and are yielding to the demands of the public welfare as determined by legislation.

Thus we see that the defects in the substantive law are due largely to the tardiness of courts and judges to respond to the popular will. Furthermore, we find that a saving grace in the modern law is the comparatively new doctrine of the police power. The history of the development and growth of our common law exhibits several striking instances of its regeneration through new found doctrines injected to render the law more responsive to the popular will. Equity was very early devised and introduced to save the common law from the hardening process to which it is subject. As business began to extend itself in the 18th Century, the common law, in order to deal efficiently with the new problems that arose, took unto itself the custom of merchants and made it a part of the law itself. And so now, while the people are impatiently struggling

⁹ 91 N. E. 69.

¹⁰ *Ritchie v. People*, 155 Ill. 99.

against the traditional conception of the rights of the individual as against the welfare of society as a whole, the police power comes to the front as the elixir of new and more serviceable life to the common law. Its rigidity is being counteracted by the application of this modern instrument for the health, safety and welfare of the people. The doctrine of police power now comes to the rescue of the substantive law and renders it again national and popular and an institution for service to the community as a whole.

Our criminal law is, of course, the great cause of popular discontent. To it more than to any other department of the law may be charged the growing disrespect of all law and the loss of prestige of the lawyer. It is a most deplorable fact and to the great shame and discredit of our civilization that in this country, at this advanced age, the statistics show more homicides in proportion to population than in all the principal countries of Europe put together. It is said that we are guilty of about nine thousand homicides annually, with only little more than one out of every one hundred avenged by legal execution. But such lax treatment of crime is not altogether to be charged to the law. The people themselves who through the jury fix the standard of conduct are largely to be held accountable. At the same time, the law itself must bear much of the blame. Judge Amidon of the United States District Court, declares that the criminal law has broken down, that "it is an unworkable machine". (Outlook, Vol. 83, page 601.) It certainly is more conspicuously true here than it is in the other branches of the law that the individual is protected in what seems to have become a vested right to commit wrong and the social welfare is overlooked if not brazenly disregarded. The announcement in the press of the commission of a shocking crime and the capture of the culprit carries with it not the slightest conviction that the right of society will be avenged by the punishment of the individual. Every one will admit that delay in the prosecution and disposition of criminal cases

is an important factor in the inefficiency of legal procedure. But the technicalities of the criminal law are chiefly responsible for the deplorable state of public disapproval. The vicious doctrine of presumed prejudice, presumed, as in this state, from error of even insignificant triviality, even from error committed by a stenographer in the misspelling of a word, or in the omission of the article "the", though the crime with which the defendant was charged and found guilty may have been the most atrocious known to our civilization, the rape of a ward, or the betrayal of a public trust, has brought our law and our courts into such utter contempt, that lawyers find it futile even to attempt an apology. The criminal laughs at the overzealousness of the appellate court to protect his individual rights and returns to society to continue with greater assurance his vicious depredations. In the meantime, there is nothing left to the people but a hopelessness and a disgust for the learned legal profession and the determination to take the law into their own hands whenever occasion again arises.

It is for the protection and welfare of society at large that the law exists. A criminal has rights, but so has the State. In ages past, when the crown or the ruling class had a tendency to oppress, the care and solicitude for the individual charged with crime indicated a leaning towards the popular welfare that won for the courts the approval of the people and the commendation of all history. But in these times when the State is not a crowned head, nor a favored class, but when the State is the people and all the people, to make a fetish of the rights of a criminal as against the rights of society is a perversion of law and an encouragement to the tyranny of the lawless and vicious. It is a pleasant platitude that better than that one innocent man should suffer let nine guilty men escape. With the publicity given to criminal trials, the care with which the defendant is made acquainted with the charge against him, the invariable rule that a defendant shall be represented by counsel, whether he can compensate such counsel or not, the facilities provided by the State for appeal after

conviction, the scrutiny applied to the record by the appellate courts, the liberality with which the pardoning power is exercised, the conviction and incarceration of an innocent man is practically unheard of. There is now no longer any danger of convicting and of holding in confinement an innocent man. But our devotion to the platitude results in no innocent man suffering while nine out of every ten guilty ones continue to escape. In our highly organized society, in the congestion of urban life, on account of the delicate interdependence of each upon all, it is not altogether a too revolutionary doctrine to say that the peace, safety and welfare of society demands that the vicious and criminal shall be segregated from it even though there may be danger that with every nine of them one innocent man shall become a martyr to the majesty of law and order.

Probably the most vicious of all the shields placed in the hands of an accused against the attempts of society to vindicate its rights to peace and security is the perversion of the wholesome constitutional provision that no person shall be compelled to testify against himself in a criminal case. An examination of the history which led to the adoption of this provision by the framers of our Constitution shows that it had been the practice throughout the Middle Ages and down to the War of the Revolution to compel persons charged with crime to make confession, and the compulsion consisted not only of promises of great reward and threats of dire penalties, but of actual physical torture of a kind to chill the blood of all who read. But all that was intended by the constitutional provision was that an accused shall be subjected to no form of compulsion. It was never intended as an absolute bar or even as an impediment to the detection and punishment of crime. And yet that is exactly what it has become today. Instead of being a wholesome provision for the protection of the innocent, it has become the means of escape for the guilty. Not only do we not compel an

accused to testify, but we warn him against offering any explanation at all of the suspicious circumstances that brought about his arrest and indictment. Moreover, juries are instructed by the court that the defendant's refusal to make any statement must not be regarded as a circumstance tending to show his own guilt. Such a perverted application of the constitutional provision results in most cases in the failure of society through its prosecuting officers to vindicate its rights. Worse than that, instead of being merely a safeguard to the innocent individual, it has bred evils as great as it was intended to prevent. Its enforcement exposes the prisoner to the inquisition of detectives and fellow prisoners, who through fraud and false pretenses and with the hope of personal reward worm out of the accused what they can, and who are constantly under the temptation to color and pervert the statements thus obtained. Moreover, another resultant of this supposed safeguard is the process known as the "third degree", an operation of nervous torture comparable with the worst forms of physical torture recorded of the Dark Ages. In the ordinary activities of life, one suspected of wrong is immediately questioned and his failure to make answer naturally arouses suspicion, and a vague, confused or false explanation inevitably brings disaster. Because the law in this respect is in conflict with common sense and the natural every day conduct of life, because the people almost daily are compelled to witness the spectacle of an enemy of society defiantly and successfully resisting the great and expensive departments of police and prosecuting officers, in their efforts to protect society against his depredations, and because crime is thus given official protection, the law is naturally and deservedly held in contempt.

In order to rectify this glaring defect, it is not necessary to return to the evil practices of barbarous times. The constitutional safeguard that no person shall be compelled to be a witness against himself may still be preserved in

its full force and intent. But it should be applied literally. Compulsion is the element to be prohibited. It is no violation of this provision, however, to refrain from warning the accused against making a statement, nor to eliminate the absurd practice of instructing juries that the defendant's wilful refusal to make a statement shall not be taken as evidence of his guilt. It would even conform with common sense and certainly be more conducive to the detection of crime, if an accused were invited to do so—not by a detective nor by a traitorous fellow prisoner but by the prosecuting attorney, in the presence of a preliminary magistrate, accompanied by an official stenographer, and immediately upon his arrest and before an opportunity has been afforded to confederates in crime or to counsel, who, when engaged in such business, are equally vicious members of society, to manufacture a story with the hope of escaping punishment or of interfering with the officers of the law in their business of detecting the real offender. Such statement, thus recorded, would be reasonable evidence at the time of trial, and the prisoner's refusal to make any statement either when invited at the time of his arrest or at the time of trial would aid the jury in their deliberations of the case. Legislation with such ends in view would not violate the constitutional safeguards thrown about defendants in criminal causes. It would conform to the practice of every day life, and would make the law accord with common sense. It would result in the conviction of the guilty and not in the slightest degree jeopardize the interests of the innocent any more than they are jeopardized under the present practice. It would eliminate a serious cause for the disrespect for the criminal law.

The adjective or administrative side of the law shares with the criminal law the responsibility for the contempt of the people for our whole system of jurisprudence. Nowhere else on the globe, with the possible exception of Spain, is to be found such a studied and well wrought

scheme to defeat the law of the land and its reasonable application. Nowhere, whether in the literature of the times, or in the gatherings of men, not even in the midst of any assemblage of the most ultra-conservative members of the legal profession can be found a sincerely disinterested apologist for our system of courts and legal procedure. The delays and expense with which ordinary litigation is attended have outworn the patience of lawyers and laity alike. The courts which should be the haven of refuge for those troubled in material things are as plague spots to be shunned and avoided. And the uncertainty with which the fixed and definite rules of law are applied, because of the exaltation of the form of presentation over the substance involved, makes of our jurisprudence a laughing-stock to those not immediately affected, and a financial and nervous drain on those who have confided their affairs to its jurisdiction. Lawyers first advise clients to keep out of the courts, and then, though able to expound what the law really is, take great pains to prepare the client against the probable contingency of a purely accidental fate. Decisions are rendered not on the merits of the controversy but on some act of commission or omission of the attorney presenting the matter for review to the appellate court. The rules and the machinery supplied for their operation were originally intended and have their sole justification in their usefulness as means to the end that justice may at least be approximated. These rules and our judicial system are now largely mere tools in what has justly been characterized as a game in which the litigant has no part except to pay the expense thereof.

A flagrant illustration of this is to be found in the decisions of the Supreme Court of Missouri that unless it is stated by the appellant in the bill of exceptions that "he then and there did duly except" to the action of the trial court in overruling the motion for a new trial, the review of the merits of the cause is denied. Such a disposition of a lawsuit is repulsive to the ordinary sense of justice.

In the first place the failure of the attorney for the appellant to insert in the bill of exceptions that he "did then and there duly except" has nothing to do with the subject matter of the controversy, nor is its omission due to any fault of the litigant himself. In the second place, it could very easily be presumed from the very presence of the litigant before the appellate tribunal that he excepts to the adverse rulings of the court below. In the third place, as a matter of fact, the appellant's attorney did not actually "then and there duly except" to the action of the trial court in overruling the motion for a new trial, and therefore the statement to that effect in the bill of exceptions is false and untrue. In St. Louis at least, unless it be by chance or in extraordinary matters, attorneys are not in Court when the judge hands down his decision overruling the motion for new trial. Consequently unless counsel inserts in his bill of exceptions that which is untrue, namely, that he "did then and there duly except", his client's controversy will not be reviewed on appeal. In answer to this criticism, it is said that the exception is presumed. Certainly it is presumed. Then why require it to be set forth in the bill of exceptions? Furthermore, on what theory of justice are litigants' rights permitted to be sacrificed by the failure of an attorney to write out a merely formal allegation? And if this formal allegation is such an indispensable one, why has it never occurred to the courts to offer the parties an opportunity to supply it? Why make a litigant suffer for the mechanical mistakes of a regularly licensed attorney?

Bills of exception serve no good purpose. They are merely a snare in which "the quest for error", as Judge Amidon calls it (*supra*), is pursued. They are not considered indispensable to the orderly logical presentation of a case in some of the other enlightened jurisdictions. They ought to be abolished in Missouri. In England, a copy of the pleadings is furnished to the appellate court, together with

a transcript of the evidence and then the question is, not, "Is there error in the proceedings of the trial court?" but the question is, "Is the judgment just?" What influence is it that prevents Missouri from adopting a similarly sensible procedure?

The time consumed in the natural course of procedure from one court in our complicated and redundant system to another, aggravated by the numerous instances of delay of a decision after the case has been briefed, argued and submitted to the court, with the altogether too frequent disposition of cases on mere matters of practice or the granting of new trials on account of an infraction by one side or the other of a rule of procedure, together with the expense attending such a tortuous, dilatory and uncertain operation, wholly vitiates the theory that our law is for the poor as well as for the rich. All men are indeed equal before the law, that is, before the substantive law, but the procedure that leads up to its application prohibits the poor man from enjoying its benefits. President Taft, in an article in the *North American Review*, Vol. 187, page 852, makes the statement:

"It may be asserted as a general proposition that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage to the litigant who has the longer purse. The wealthy defendant can always secure a compromise or a yielding of lawful rights on account of the necessities of the poor plaintiff."

A poor man wronged by a wealthy individual or corporation who undertakes to obtain relief through the courts of the land is in not much better position than was Tantalus doomed by the gods eternally to stand up to his neck in water which fled from him when he tried to drink of it, and over whose head hung fruits which the winds wafted away whenever he tried to grasp them.

The jealousy with which we in this State protect the right of every litigant, no matter how poor or how trivial in dollars and cents his controversy may be, to have his case heard by all the appellate courts of the land, springs naturally from our lack of confidence in our inferior courts.

In our courts of first instance where the mass of litigation in the large cities is forced to have its beginning, the law is as a general rule unknown and unknowable. In one of the justice of the peace courts in St. Louis, youthful counsel recently argued the legal propositions involved in a case on trial at great length. The justice finally announced his decision. A bystander who had been much impressed by the arguments, ventured afterwards to ask the justice what influenced him to render the decision he made in the case. "Influence?" resentfully retorted the justice, "there was no influence. I did not know either party."

The older members of our profession, and those whose lives are spent outside the large cities, contemplating the evils of our jurisprudence, are naturally absorbed with the problems of technicalities and delays in our appellate courts. How to get a speedy hearing and a final disposition of the cause on the merits constitutes for them the whole problem that requires attention. But the younger members of the bar and those who practice in the large cities realize that the character of our courts of first instance for the trial of petty offenses and controversies is a serious menace to the majesty of law and a flagrant cause of popular disrespect for its administration. When it is remembered that the very large mass of people are of small means, and that consequently their difficulties requiring the aid of law for correction or amelioration, are violations of city ordinances, petty misdemeanors, and claims and controversies involving less than five hundred dollars in amount, and when it is remembered that their only point of contact with law and courts is the police court and the justice of the peace court, it becomes apparent that the popular respect for law and order depends largely upon the character and efficiency of these inferior tribunals. And it is because, with the exception of the City of Chicago, and the very recent exceptions of New York and Buffalo, throughout the country there has been preserved in all their ancient inadequacy the institution of the justice of

the peace court and the unscientific police court, that with the mass of our citizens law and its administration have fallen into disrepute. Without the facilities for exact computation, it is safe to say that to every ten persons who come into our appellate courts, and to every one hundred that deal with our circuit courts, thousands of our people in the larger cities are forced to resort to justice and police courts. And with the largest portion of these, the justice and the police courts are not only courts of first instance, but also of necessity courts of last and final jurisdiction. The large mass of our people of the cities know no other standard of American justice than that which is exhibited in these inferior courts, and yet to these courts our officials and the legal profession pay least attention. For the disgraceful state to which the judicial machinery for the disposition of so-called petty matters has sunk, the prevailing system of politics must be charged with some of the blame. But the legal profession is not without responsibility. Lawyers of the highest standing, men who are accredited with the loftiest ideals, not only tolerate such conditions but actively support them. One of the most distinguished lawyers in St. Louis, in discussing the activity of the Bar Association of St. Louis two years ago to obtain legislation to wipe out the justice court and to establish in its stead the civilized system of municipal courts, patterned after those now existing in the City of Chicago, said:

"If you take away the justice courts and the House of Delegates, we will have no politics. Those places are all that are left for the politicians to work for."

Such a sentiment indicates the real obstacle in the way of reform. It reflects an aristocratic attitude of mind, deplorable ignorance of the wants and needs of the majority of our people, a misconception of the function of the law in a democracy, an anti-social point of view which education must first eradicate from the makeup of the legal profession before the administration of law may be converted into an instrument for the welfare of the people.

Another difficulty in the way of intelligent and effective reform in our judicial system and legal procedure is the utter lack of information as to their operation and effects. No other institution is without its statistics. The reports of public officials in every other department of the public service tell at a glance the cost of administration of the office or department and the efficiency with which its work is performed. A system of statistics showing the number of cases instituted in our courts, the time expended in their consideration and disposition, the number of trials *de novo* in smaller controversies and petty offenses, the number of appeals upon points of law, the wasteful retrials, the disposition of cases on points of practice, and then the terrific cost not only to litigants but to the State at large, would bring about a veritable revolution in our antiquated and unjust system. Because of our lack of definite knowledge, the evils have been allowed to accumulate and to grow until the conditions under which the law is administered have become intolerable. Mere continued complaint, confined as it is to newspaper and magazine discussion and to an occasional Bar Association address, will result in nothing but aggravation of the growing contempt for the whole institution of law and its enforcement, which if not abated by intelligent and scientific reform will inevitably bring disaster to our whole social and political fabric. The evils in our substantive law, that law which is the crystallization of the customs and aspirations of the people, they, the people, have the power to correct. But the evils in the administrative law, in the judicial machinery and legal procedure, the legal profession, lawyers and judges alike, must reform.

Suggestions for reform are not wanting. Everyone has some remedy to offer either for a part or for all the evil. These remedies may be the very ones to adopt, and yet because of the lack of publicity and the consequent lack of study of them by the profession and by the people at large, no remedy thus offered meets with the approval necessary

for its adoption. It is the first duty of lawyers as a body to suggest safe and sane methods for arriving at an intelligent solution of the problem. To this end, it is respectfully urged that the Missouri Bar Association call upon the Governor and through him upon the next session of the Legislature to create a commission which shall be charged with the duty of studying the evils, and of discussing them and their proposed remedies with the legal profession and with the public, and to come back to the Legislature of 1913 with a scheme for the reorganization of all our courts, the whole of our judicial machinery, and with recommendations for the reform of our legal procedure.

By such action, and by the dedication of our talents to the welfare of the people in so far at least as the administration of law affects it, we shall help to restore the legal profession to its traditional place of nobility and dignity. The clergy throughout the civilized world is engaged in the inspiring task of revitalizing and popularizing religion and of socializing the institutional church. The medical profession has organized itself and assembles for the purpose of giving the world the benefit of its scientific knowledge to the end that disease may be prevented even though the need of doctors may thereby tend to be diminished. That the legal profession may regain its ancient place of equal nobility with the ministry and the medical profession, lawyers must demonstrate that, above employment to private interests for mere pecuniary gain, they also value and cherish the ideal of serviceableness to mankind. Law is a means and not an end. And the end is not the development of a game for the intellectual delectation of judges and lawyers, nor is it that lawyers shall by their wits be able to serve the greed and tyranny of a favored few, but the end of law is that justice and righteousness shall prevail in order that we may realize, in these United States, the ideal of a true democracy.

F. M. GROSSMAN.

ST. LOUIS.

DECISIONS OF THE FEDERAL COURTS ON
QUESTIONS OF STATE LAW.

KUHN v. FAIRMONT COAL CO., 215 U. S. 349.

Our American system is a very complicated one. With the Federal government on one side, and those of the States on the other, each supposed to be supreme within its proper limits and yet with the only division between them such as human language affords, we need not wonder that there have been endless disputes and a desperate civil war. In nearly every department, there has been conflict. We are here concerned, however, with only one line of dispute, which has raged for nearly three-quarters of a century and is still not near a settlement, between the courts of the two systems. It is well illustrated by the case whose name stands at the head of this paper.

Kuhn v. Fairmont Coal Co.,¹ decided in 1909, was a suit brought in the United States courts by a citizen of Ohio against a West Virginia corporation, to recover damages for the subsidence of the surface-land, in consequence of the corporation's failure to leave sufficient support, when it mined the underlying coal. The deed of the grantor, Kuhn, had conveyed "all the coal" underneath the tract in question, and in West Virginia it had been held by 4 to 1 in an identical case, decided after the date of the Kuhn deed, that in such cases there is no implied reservation of the right to support. This decision, so the United States Supreme Court hold by 4 to 3, is not to be followed by them. There are consequently two rules of property within the same limits for identical transactions.

That this is an anomaly can hardly be doubted and is now generally admitted. It has been illustrated in many cases, and the results are extraordinary in a civilized system. Two notes are given at the same time for the same

¹ 215 U. S. 349.

debt. On one, the defendant can only be sued in the State court and escapes liability by setting up the equities. The other note comes to the hands of a citizen of another State, who has the right to sue in the United States courts, and there the same defendant is held liable.² One who has loaned money on a series of bills of lading, which turn out to be fraudulent, must submit to a judgment against him in a suit on one of the bills, while another suit on an identical bill results in a full recovery in another forum.³ The same defendant sued by two plaintiffs, is liable to one, because he was a stockholder in a corporation, and is not liable to the other, because he was not a stockholder.⁴ These results are highly incongruous and yet they are types and necessary results of the decisions which the United States courts have made. It is the purpose of this paper shortly to review these cases from a historical point of view.

When a very young lawyer, as far back as 1882, the present writer published an article⁵ under the same main title as the present one. The effort was there made to trace historically the growth of the principles of decision, which have become established in those cases in the United States courts, in which they are called upon to determine questions of State law. Any reader will easily understand how interesting it was to read the recent case, which is the text of this article, and there see exemplified the truth, which the writer tried to enforce twenty-eight years ago, that the cases refusing to follow the State rulings are utterly unsound. So unsound that even today, in the highest court of the land, years and years after the first and many subsequent breakings away from true principle, the cancerous growth is still grudgingly accepted by the court itself, and three justices unite in a dissent against the four who compose the majority.⁶ This too, in a case where the temptation to depart from the State rule was certainly strong, for I

² *Swift v. Tyson*, 16 Peters, 1.

³ *Friedlander v. R. R.*, 130 U. S. 416.

⁴ *Burgess v. Seligman*, 107 U. S. 20.

⁵ *Southern Law Review*, December, 1882, pp. 452-93.

⁶ Only seven justices took any part in this case.

imagine there will be little dissent from the view that the decision of 1905 in the State Court was wrong.⁷

In my article of 1882, it was pointed out in the first place that practically all the federal jurisdiction divides itself into two great classes, radically different the one from the other. In all cases involving the meaning of the federal constitution or statutes, they have jurisdiction of the subject matter of the case. The question arises under the legislation of that governmental agency of which they are a part, and who but the judiciary of any government is to settle the meaning of its laws?

In the other main division of their jurisdiction—and *Kuhn v. Fairmont Coal Co.* belongs in this class—it was pointed out that they have no jurisdiction of the subject matter, but the case comes before them simply and exclusively because that one particular suit chanced to arise between citizens of different States. In probably a thousand other cases raising the identical question, but in which the purely adventitious fact of diverse citizenship does not arise, they will have no jurisdiction whatsoever.⁸ Is there any general principle of law to point out the rule of decision in such cases? And on the other hand, is there possibly some reason in the special circumstances of our system to limit or abrogate that rule? In other words, was the jurisdiction in citizenship cases conferred for some purpose which would be rendered ineffective by the application of the general principle?

As an ordinary rule, there can be no shadow of doubt but that in the class of cases referred to, all courts, by virtue of what is called comity and might equally well be described as a decent respect for the law as interpreted by the judiciary of that sovereignty under whose system the case arose, decide the litigation by simply ascertaining what is the rule

⁷ *Griffin v. Fairmount Coal Co.*, 59 W. Va. 480. The judgment is rested on the broad language of the deed as to the right to mine *all* the coal, and to some extent (p. 488) on a

provision of their code as to what deeds shall, in the absence of exception, be construed to include.

⁸ One writer contends otherwise, but his plan will be examined later.

in the sovereignty in question. This is a well-known principle, and methods of proving the foreign law are pointed out by text-book writers. Is there any reason to suppose that the general application of this principle—and it will shortly be shown that it was applied without exception during more than the first half century of our existence, and by the constructive mind of the great founder of our judicial system—would fail of carrying out the purpose for which the jurisdiction in citizenship cases was conferred?

Some writers, and not a few decisions, seem to assert the view that, unless the Supreme Court of the United States in every case examine the law arising in the particular suit and give the litigants the effective benefit of their individual opinion, the constitutional provision in citizenship cases will fail of its purpose and be in reality nullified. But surely this is going too far. The terms and evident intent of the provision are fully met otherwise, and known historical facts demonstrate, I submit, that such cannot have been the purpose. The jealousy felt in each State towards the citizens of other States was beyond doubt the moving cause for the provision, and the object was to secure to such litigants a reasonably fair trial under a jury and judge selected by another power than the State authorities. This was a very valuable privilege to a Puritan from New England engaged in litigation with a Pennsylvania Quaker, or to a far-off South Carolinian claiming to recover land in New York from a citizen thereof holding under some possessory title. The chance for a fair decision on the facts in the federal tribunal was vastly greater, and, when to this is added the guiding influence of a trial judge free from State prejudice, the purpose of the provision seems amply explained and fulfilled.⁹ Imagine a trial in the Pennsylvania County Court in the vale of Wyoming—the seat of

⁹ This view of the provision seems to be maintained by Justice McKinley in his dissent in *Lane v. Vick*, 3 Howard, 464 (1845). Taney ex-

pressed his general concurrence with McKinley, and Story was absent.

the Pennamite wars—between a claimant under the Connecticut title and a Pennsylvanian, about the year 1795, and what chance would the former have had? The passion left by the blood and contest of that day would have rendered his suit absolutely hopeless. How different under the constitutional provision which enabled him to sue in the Circuit Court of the United States for the Pennsylvania District before Judge Paterson¹⁰ of New Jersey, and with a jury selected not from the county of the contest but from the body of the State.

I submit therefore that this was the purpose of the citizenship provision, and it seems to me impossible to suppose that the correction of errors in law—the setting up of another rule of law within the State, different from that of the State courts—was what those careful men in the Convention of 1787 had in view. He who knows the boundless State jealousy of those times will not need to be told that it is *prima facie* stupendously unlikely either that they meant this, or that the States would have without objection ratified the constitution, if they had even dreamed that such a meaning was hidden within its four corners.

There is little in the history of the Convention of 1787 to show the meaning of the provision. At the very opening of the proceedings, the Virginia resolutions (No. 9), proposed that the federal courts should have jurisdiction of “cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested.” This language was varied in committee of the whole and the 13th resolution was reported from the committee with a provision reading: “The jurisdiction of the national judiciary shall extend to . . . questions which involve the national peace and harmony.” During the later consideration in the Convention proper, the New Jersey plan was offered but contained nothing upon this subject. The pro-

¹⁰ In *Van Horne's Lessee v. Dor-*
rance, 2 Dallas, 304, Judge Peters,
of Pennsylvania, of the District

Court, also sat, but Paterson was
the presiding judge and charged the
jury.

vision as quoted was not materially altered in the Convention and was referred as the 16th resolution to the Committee of Detail. Next, in drafting a form of constitution from the resolutions, Randolph, evidently in the effort to work out the details of the 16th resolution, inserted in his draft a provision giving the national judiciary jurisdiction "in disputes between citizens of different States," and the Committee's proposed constitution read (Art. XI., Par. 3), "The jurisdiction of the Supreme Court shall extend to all cases . . . between citizens of different States." The only material alteration later made in this language was by changing the first words to read: "The judicial power."¹¹

But all heretofore said is merely argument from probabilities. Have we any more secure ground to stand upon? I am not aware that the citizenship clause was discussed to any great extent during the process of ratification, but it was referred to very clearly in Virginia and we have an almost conclusive indication of its meaning in the contemporaneous exposition given it, not only by the greatest of our chief justices, but by all other judicial authorities during the first fifty years of the existence of the constitution.

In the ratifying convention of Virginia, George Mason expressed¹² dissatisfaction with the provision giving the federal courts jurisdiction in citizenship cases, and Patrick Henry was very explicit. "I shall," he said,¹³

"give my voice for the federal cognizance only where it will be for the public liberty and safety. Its jurisdiction, in dispute between citizens of different states, will be productive of the most serious inconveniences. The citizens of bordering states have frequent intercourse with one another. From the proximity of the states to each other, a multiplicity of these suits will be instituted. I beg gentlemen to inform me of this—in what courts are they to go and by what are they to be tried? Is it by a law of Pennsylvania or of Virginia?"

¹¹ The Growth of the Constitution, by William M. Meigs, pp. 234-40, 247-49.

¹² Elliot's Debates, III., 551 *et ante*.
¹³ *Ibid.*, 542.

To this John Marshall replied:¹⁴

"The honorable member objects to suits being instituted in the Federal courts, by the citizens of one state, against the citizens of another state. Were I to contend that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment. But are not the objections to it carried too far? . . . In the court of which state will it be instituted? said the honorable gentleman. It will be instituted in the court of that state where the defendant resides, where the law can come at him, and nowhere else. By the laws of which state will it be determined? said he. By the laws of that state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No, it is a principle in the jurisprudence of this commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland, where the annual interest is at six per centum, and a suit instituted for it in Virginia; what interest would be given now, without any federal aid? The interest of Maryland must certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision."

To this outline of his opinion of the law in these cases, Marshall adhered loyally to the day of his death. He was clearly not playing here the part of a mere advocate, striving to meet objections and to secure ratification by advancing any argument likely to satisfy critics and the hesitating. He was doubtless too big-hearted and too honest to resort to these tricks, despite the partisanship of his nature, and he was simply expressing an opinion which seemed to him and many others as plain as the noonday sun. He was never once—so far as I have been able to find—shaken in this view during his thirty-four years on the Supreme Bench, while his great mind was forging our jurisprudence into a shape, which some of his followers have alas! departed from to its detriment.

The effort seems to be made by a recent writer¹⁵ to bolster up Story and Taney in their departure from then

¹⁴ *Ibid.*, 556, 557.

¹⁵ Prof. Schofield, in his article on "Swift v. Tyson, Uniformity of Judge-Made State Law in State and

Federal Courts," in Vol. IV., of *Illinois Law Review* (March, 1910), pp. 533-551; 539, 542, 546.

established principles as to federal decisions on questions of State law, by some supposed teachings of the great chief justice, but it cannot succeed. Marshall's record is too clear. It will be necessary here, in order to show this fact, to recall some of the decisions of the Supreme Court during the first fifty years of our existence. These, by the way, were entirely omitted from the discussion in *Kuhn v. Fairmont Coal Co.*, and the argument confined almost absolutely to cases after 1842 and chiefly of a still later date. Possibly, Marshall's name has lost its authority in the eyes of the modern bench, and the earlier decisions have beyond question been largely submerged by the chaos of doctrine of the last fifty or seventy years; but they are of course essential in a historical examination.

Swift v. Tyson,¹⁶ decided in 1842, is the case from which our modern juridical troubles in this regard take their origin, and of course it bulks large in all discussions of the subject. It will shortly be considered, but first some preliminary points must be disposed of. In *Swift v. Tyson* to some extent, and still more in the recent case of *Kuhn v. Fairmont Coal Co.*, there is a good deal of what seems profitless discussion as to the meaning of the expression (contained in section 34 of the Judiciary Act of 1789, Revised Statutes 721) "the laws of the several States . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Does the word *laws* include the decisions of the courts, it is asked, and this question is soon resolved into the merely academic one of whether courts declare or make law. Surely, this is unprofitable and a very poor ground for those to rest their case upon,¹⁷ who think the United States courts should in such cases follow the State courts. That the courts do in fact make the law to a large extent, despite Blackstone, is too plain to need argument, but with-

¹⁶ 16 Peters. 1.

¹⁷ As early as 1814. In *Golden v. Prince*, 3 Wash. 313, Justice Wash-

ington examined this point, but rested his decision on comity.

in the purview of the provision of the Act of 1789, it is in my judgment clear that the decisions of the courts are not laws. Statutes are what were intended to be made rules of decision by that provision.

If this is thought by any one to be a giving up of the case, the answer is (1) that an unsound and untrue reason is worse than none, and that my purpose is to ascertain the true basis to stand upon, and (2) that it is not contended that there is any binding statutory obligation to follow the State courts. I should, with Marshall, rest that obligation with full confidence upon comity and a conviction of the soundness of his view expressed in 1825¹⁸ that

"No court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes. . . . On the same principle, the construction given by the courts of the several states to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."

The eminent Justice Bushrod Washington, too, wrote in 1814 in *Golden v. Prince*,¹⁹ "The injustice as well as the absurdity of the former (the Federal courts) deciding by one rule, and the latter (the State courts) by another, would be too monstrous to find a place in any system of government."

This view was, as has been said, loyally adhered to by Marshall, so long as he was upon the bench, and it will be shown that the first departure from it was not made until several years after his death. The first case, too, to slip off the track was one in which the temptation to make an exception was unusually strong; the decision turned on a question of *general commercial law* and a well known Latin quotation²⁰ was used with effect. Indeed, it was at first in questions of commercial law only that the exception be-

¹⁸ *Elmendorf v. Taylor*, 10 Wheaton, 152.

¹⁹ 3 Wash. 313.

²⁰ Non erit alia lex Romae, alia

Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.

came established for the United States courts to decide as they thought right, with little regard to the State decisions; but, the breach once made, it soon grew wider, and the rule of not following came next to be applied occasionally but quite irregularly in what were called questions of "general jurisprudence," by which was meant the interpretation of written instruments, the determination of rules of the common law, and so on. It was but a few years after this that they began to rule differently from the State courts as to the meaning of State statutes. All this will be shown from the decisions later and is mentioned here only for the purpose of marking the contrast with Marshall's course.

There did not exist in his day a general commercial law, apart from a sovereignty to create it, floating in the air, intangible. His great mind knew of no such fourth dimension of space. In 1803 the case of *Mandeville v. Riddle*²¹ was decided by him. It presented the bare question whether, under a contract made in Virginia, a remote assignee of a promissory note could sue the maker. A question purely of commercial law, and in which there could certainly not be the smallest doubt as to what was the general rule! But this is not so much as adverted to. The only discussion—and it is short—is, what was the law of Virginia upon the subject. It is true that the leading point was whether Virginia had in any way adopted the statute of Anne in regard to promissory notes, but the Virginia decisions are examined, and neither in the opinion of Marshall, the arguments of counsel, nor in the long note upon the case contained in an appendix, is there the slightest hint as to an overruling general commercial law. As soon as it is shown that the suit could not have succeeded in the Virginia courts, judgment is entered against the plaintiff. Is this the teaching from which Prof. Schofield thinks that "Marshall's pupil," Story, learned the doctrine of *Swift v. Tyson*?

²¹ 1 Cranch, 290.

This same litigation was the means of showing once more in a few years how closely the State decisions were then adhered to. In 1809, in *Riddle v. Mandeville*,²² the same parties sued on the same note in equity, and Marshall, after showing that the suit could be maintained in equity under the Virginia decisions, entered a decree for the plaintiffs. Again in 1805 and 1810, decisions²³ were rendered with which the modern doctrine of Story is not easy to reconcile; and in 1828 in *Gaither v. Bank*,²⁴ it is held that a suit upon a promissory note cannot be maintained because the note was tainted by usury and therefore void, under the law of Maryland. "This case is governed by the laws of Maryland," says the opinion of Justice Johnson. In 1838 and 1841 respectively, *Bank v. Daniel*,²⁵ and *Smith v. Clapp*²⁶ are very similar in that they discuss in commercial cases not only the statutes of the States having a bearing, but the decisions as well.

All of these cases, except the two last, were decided in Marshall's day. It is quite true that they were largely concerned with *statutes* of the State concerned, but it is very remarkable that not the faintest hint of Story's doctrine as to a general commercial law is to be found in any single one of them, and the two suits in the Mandeville and Riddle litigation seem to decide expressly that in such cases, as well as in others, the *decisions* of the State courts will be followed. It is worthy of note, too, that the same was the opinion of the court before Marshall's day. In 1797, in *Brown v. Van Braam*,²⁷ in a suit on a bill of exchange, the court wrote, "We are unanimously of opinion that, under the laws and the practical construction of the courts of Rhode Island, the judgment of the Circuit Court ought to be affirmed"; to which a foot-note adds that "Chase Justice observed, that he concurred in the opinion of the court, but

²² 5 Cranch, 322.

²³ *Levy v. Gadsby*, 3 Cranch, 180, and *Lewis v. Harwood*, 6 Cranch, 82.

²⁴ 1 Pet. 37.

²⁵ 12 Pet. 32.

²⁶ 15 Pet. 125.

²⁷ 3 Dall. 344.

that it was on common law principles, and not in compliance with the laws and practice of the State."

So much for the claim of Marshall's great authority as a prop for the general commercial law doctrine. Now let us examine shortly what he thought to be the duty of the federal courts, when in a citizenship case they are called upon to decide the meaning of a State statute or of the customary (i. e., common) law of a State. His record here again is quite as clear, and he never ran off on any one of the ordinary tangents—as that written words must mean the same the world over (of course they do not), or that the court over which he presided was as competent as the State courts to decide what is common law, or that it was *infra dig.* for the Supreme Court of the United States to overrule a prior decision of its own and follow the State court.

Thus in 1805, in the case of *Telfair v. Stead*,²⁸ the following contains every word of Marshall's very short opinion: "The only doubt which the court had, was whether by the laws of Georgia, the land could be made liable, unless the heir was a party to the suit. We have received information as to the construction given by the courts of Georgia, to the statute of 5 Geo. 11. making lands in the colonies liable for debts, and we are satisfied that they are considered as chargeable without making the heir a party."

In 1825, in *Elmendorf v. Taylor*,²⁹ where the question presented was as to the effect of adverse possession of land in Kentucky, Marshall wrote:

"Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky. This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of that state have given to these laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by prin-

²⁸ 2 Cranch, 407.

²⁹ 10 Wheat. 159.

ciple. would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

Again, in 1827, in *St. John v. Chew*,³⁰ they followed State decisions as to the meaning of a will and remark per Justice Thompson that "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of." And that it was not only a series of decisions establishing a rule of property that they would at that day follow, was shown four years later, when in 1831, in *Henderson v. Griffin*,³¹ they follow without examination a single decision in South Carolina as to the meaning of the will in question in that case.

The same desire to be guided by the State decisions had been exemplified in 1829, between the dates of the two last cited cases, when in *Bank v. Dudley*,³² upon being informed during the argument of the case at bar that the question on which the case turned (the meaning of certain statutes of Ohio) was then pending in another suit in the Supreme Court of the State, Marshall held the cause in the Supreme Court under advisement until the State court should decide the question, and then announced his decision in accordance therewith.

³⁰ 12 Wheat. 153.

³¹ 5 Pet. 151.

³² 2 Pet. 492.

A very striking instance occurred in 1832, in *Green v. Neal*,³³ when the United States Supreme Court overruled without hesitation two of its decisions, rendered in 1816 and 1829, in regard to the meaning of a Tennessee statute, for the sole reason that the courts of that State had meanwhile ruled the point involved in a manner opposed to that which the United States Supreme Court had enforced in the two cases referred to. In 1816, in *Patton v. Easton*,³⁴ the United States Supreme Court had decided, in accordance with their understanding of the Tennessee ruling, that in that State seven years' possession of land was a bar, only when held under a grant or a deed founded on a grant. In the opinion, they said, "this question too has at length been decided in the Supreme Court of the State." Once more, in 1829, in *Powell v. Harman*,³⁵ they rendered a decision to the same effect. But in *Green v. Neal*, it was shown that the Tennessee decisions referred to had never been accepted in the State as settling the construction of the act and that since their date it had been clearly ruled that adverse possession alone was enough. This later conclusion they accept in *Green v. Neal* in an opinion by Justice McLean. Justice Baldwin dissents, and it should be added that some doubt was left as to following a single decision.

It is well worthy, too, to be noted that in 1843 even Story held the case of *Springer v. Foster*³⁶ under advisement, until the Supreme Court of Massachusetts, the law of which State was in question, should decide the point, and then decided accordingly. Yet the same eminent authority had already refused in 1838, in *Thomas v. Hatch*,³⁷ to follow a decision of the Supreme Court of Maine as to the meaning of a deed for land in that State. The two cases are hard to reconcile, unless we suppose that the Massachusetts decisions were regarded by Story with a more favoring eye than were those of Maine.

³³ 6 Pet. 292.

³⁴ 1 Wheat. 476.

³⁵ 2 Pet. 241.

³⁶ 2 Story, 285.

³⁷ 3 Sumn. 176.

Such were the principles upon this question laid down by Marshall and his associates, as they strove to hew out a sound system of jurisprudence for the new country. But in 1842 Story broke away from all this, and within a quarter of a century chaos was the result, and the chaos has continued since then to grow more and more without form. Not that the decision of Story here referred to, was absolutely without a hint in some of the earlier decisions. Few, if any, judicial principles spring into being in this way, with nothing whatsoever behind them as a support, and some vagaries of single justices, or even apparently of the court, are to be found having the same tendency. But they were merely sporadic and took no root until 1842. They were very few, too, in number, so far as I have been able to find.

In 1821, in *Preston v. Bowmar*,³⁸ Story seems already to have perhaps entertained some doubt as to always following the State rulings. The case presented a question of land-law from Kentucky, and Story wrote,

"Whatever might be our opinion (and we wish to be understood as expressing none), if the question in this case were entirely new, it cannot be affirmed, that there has been such a clear mistake of construction, as that justice and law require us to depart from the decision of the local tribunals. . . . This very case, between the same parties, has been already adjudicated in the Court of Appeals of Kentucky. . . . (Their decision gives) a construction which cannot be pronounced unreasonable, or founded in clear mistake."

In 1823, too, in *Daly v. James*,³⁹ though the opinion of the court by Justice Washington followed a single decision rendered in Pennsylvania by a divided court that "heirs" was a word of limitation, yet the dissent of Johnson, while recognizing the respect due to the State rulings and the necessity of following an uniform course of decision, added to this the words, "But a single decision on the construction of a will, cannot be acknowledged as (of) binding efficacy." In 1826, too, in *Shelby v. Guy*,⁴⁰ there is some restlessness to be found in Justice Johnson's opinion in re-

³⁸ 6 Wheat. 580.

³⁹ 8 Wheat. 495.

⁴⁰ 11 Wheat. 361.

gard to following the State decisions, though the decree is not open to the same criticism. The point at issue was as to the meaning of the words "beyond seas" in the Tennessee statute of limitations, which words were identical with those used in the statutes of limitations of several States; and these words had been held by the United States Supreme Court, in a case from Georgia, in 1818,⁴¹ to mean, not literally what the words imply, but without the limits of the State. This interpretation, too, was in undoubted accord with the decisions generally rendered in the United States, as to the meaning of the words. It was contended however that the Tennessee courts had held to the literal meaning of the words, and the court was asked to overrule its decision in *Murray v. Baker* and to conform to the alleged Tennessee rule. The decision was that the case must go back on other grounds, and a decision upon the special point was waived, the opinion expressing a hope that the State court would meanwhile furnish light "upon the fixed law" of the State upon the subject. But Justice Johnson who wrote the opinion, was clearly not fully satisfied as to the necessity of following. Story's own earlier decision in 1838, in *Thomas v. Hatch*,⁴² in which he refused to follow a Maine decision as to the meaning of a will, should also be recalled here. In 1841, too, in the well-known case of *Groves v. Slaughter*,⁴³ the court seems to have been on the point of breaking bounds, though they did not actually do so. The question in that case was whether a provision in the Constitution of Mississippi *per se* prohibited the introduction of slaves after a certain date, or was merely directory to the Legislature, and the most elaborate consideration was given to it. Clay, Webster and Walker were of counsel, and cases were cited from Mississippi which were claimed to decide that the provision was *per se* a prohibition, but these were distinguished, and the opinion of Jus-

⁴¹ *Murray v. Baker*, 3 Wheat. 541. ⁴² 3 Sumn. 176.

⁴³ 15 Pet. 449.

tice McLean showed beyond question a strong tendency to refuse to follow the decisions in question. But, though thus so nearly ready to break down the bars, the court did not do so directly in this case, but aimed to attain the same end by the judicial byway of distinguishing.

The discredit or credit of making the first actual departure from the rule of Marshall and the early court, was reserved for the restless ambition of Story, and his opportunity came in 1842 in *Swift v. Tyson*.⁴⁴ That eventful case had arisen in New York, and presented the question whether in a suit by an indorsee against the maker of a note, and where it was shown that the indorsee had taken the note as security for a pre-existing debt, the maker would be permitted to prove the equities between himself and the payee, in order to escape liability. It was contended that, by the decisions in New York, the equities could be so proven. Story examined these cases and does not think them clear upon the subject, but then goes off to the principle of a supposed floating general commercial law and holds that in such cases the United States courts must decide independently. He concludes that the general rule is different from that claimed to prevail in New York and decides accordingly. There is, too, some discussion as to whether the provision of the Judiciary Act of 1789 that "the laws of the several States" shall be rules of decision, etc., extends to include among such laws the decisions of the State courts; but possibly this is only an example of the skill of an advocate who sets up or gladly seizes upon an unsound reason, apparently favoring his opponent, shows that it will not hold water, and thus aids his own cause on the principle of *falsus in uno, &c.*

It is not entirely clear from what has been shown of Story's action in other cases⁴⁵ whether he meant to extend

⁴⁴ 16 Pet. 1.

⁴⁵ The very next year (1843), in *Springer v. Foster*, 2 Story. 385, while sitting in the Massachusetts Circuit, he held a case under advise-

ment, until the Supreme Court of the State should decide a then pending case, in which the same question arose, and then decided accordingly.

this new principle any further than to hold that in cases depending on questions of general commercial law the federal courts would decide independently. But no principle stands still on the ground on which it is first set, and this one grew rapidly. In a very few years, the supposed general commercial law was no longer enough to satisfy the craving appetite of the court for power, and the doctrine was widened to extend the rule of departure from the State rulings to cases depending on what they called "general principles of jurisprudence," while numbers of other cases, also, not so easy to classify, were equally decided in a way to set up a second rule of property within the limits of the State in question.

Only two years later than *Swift v. Tyson*, in *Lane v. Vick*,⁴⁶ they refused to follow decisions of the State court as to the meaning of a will, thus in effect overruling *Henderson v. Griffin*,⁴⁷ if not *St. John v. Chew*.⁴⁸ And again in 1846, in *Foxcraft v. Mallet*,⁴⁹ *Lane v. Vick* is cited with approval. In 1849, in *Williamson v. Berry*,⁵⁰ they do the same thing as to a private Act of Assembly, interpreting it in a way different from that in which the State court had decided. Again, in 1851, in *Neves v. Scott*,⁵¹ the same thing was once more done, in a case depending on the meaning of marriage articles. But, *per contra*, in two cases⁵² in 1849, closely at the same date as the other cases cited, they declined to depart from the State decisions as to the powers of a corporation. It is worthy of note, too, as showing how the new doctrine was found to work, that in 1860, in *Suydam v. Williamson*,⁵³ they overruled *Williamson v. Berry* and followed the State decisions as to the meaning of the private Act of Assembly concerned in both cases.

It is not at all clear how, in some of these cases, an unseemly conflict with the State courts was avoided, for the

⁴⁶ 3 How. 464 (1844).

⁴⁷ *Supra* (1831).

⁴⁸ (1827).

⁴⁹ 4 How. 353.

⁵⁰ 8 How. 495.

⁵¹ 13 How. 268.

⁵² *Smith v. Kernochan*, 7 How. 198; *Nesmith v. Sheldon*, 812.

⁵³ 24 How. 427.

two sets of courts had interpreted the same will in different ways. I know of no record of conflict in any single one of them, but under such a system one could well arise any day. More than the whole of a fund might for instance be awarded to the various parties entitled, and of course irreconcilable differences could arise in a thousand other ways.

Another highly important decision was rendered in 1847 in *Rowan v. Runnels*.⁵⁴ The opinion is by Chief Justice Taney, and the question presented was the same as had arisen six years earlier in *Groves v. Slaughter*, whether a provision of the Mississippi constitution in regard to the introduction of slaves after a certain date was *per se* prohibitory of their introduction, or was merely directory to the legislature. In *Groves v. Slaughter* great doubt had been intimated whether the Mississippi decisions ought to be followed anyhow, and then a tribute had been paid to the old principle of following the rulings of the State courts by proceeding to "distinguish" the cases cited from Mississippi. They were in reality probably not capable of being distinguished, and, when *Rowan v. Runnels* was decided, later decisions had rendered the State ruling far too plain for this judicial subterfuge, so Taney took the bit in his teeth and ran away from another of the then well established marking-posts of our system of jurisprudence. Taney's opinion lays it down that, when they have once decided a point, they will not change their ruling, so as to follow later decisions of the State courts. They ought not, he says, to give such decisions a retroactive effect, and thus render invalid contracts entered into with citizens of other States, which, in the judgment of the Court, were lawfully made. To this was added another statement, which has also been quoted many times since, that so to hold would be to render useless the provision of the United States Constitution giving the federal courts jurisdiction in suits between citizens of different States.

⁵⁴ 5 How. 134.

This is the first case I have ever been able to find in which the United States Supreme Court refused to follow the ruling of the State courts in regard to the meaning of a State Constitution or statute. It was not decided until fifty-eight years after the Constitution went into effect and after any number of directly contrary decisions had been rendered by the same court. It was soon directly followed in *Sims v. Hundley*,⁵⁵ and in the course of the sixty-three years which have elapsed since its decision, it has been repeatedly followed and widely extended, while often in extremely similar cases the court have for one reason or another not seen fit to carry out their rule of departure from the State decisions. Candor must surely admit that the result has not yet been to attain certainty of the law.

One other case must be cited, the effect of which seems most extraordinary, though probably a natural outgrowth of prior decisions. In 1855, in *Pease v. Peck*,⁵⁶ they declined to follow the courts of Michigan as to what constituted the statute law of that State. The laws of Michigan were published by authority, and for a series of years the authorized publication had printed the statute of limitations with a proviso in favor of persons beyond seas. Later, the manuscript law was found and did not contain that proviso. What was the true law of Michigan? The United States Circuit Court had held the published law to be the true one; but by the time this case reached the Supreme Court on error, the Supreme Court of the State had held the manuscript law to be the actual statute. They decline to follow this and intimate that they will not reverse a decision of the lower court, because the State Supreme Court has subsequently decided differently from the decision of the lower federal tribunal.

In very many of these cases, the court bore special emphasis, when arguing their duty to depart from the State rulings, upon the fact that the decision depended on "gen-

⁵⁵ 6 How. 1 (1848).

⁵⁶ 18 How. 595.

eral principles of jurisprudence." Probably, this was in reality little but an expression of their feeling of the need to lay down some reason to justify a departure from the ordinary rule, but only a few years passed by before they ceased to feel any such need. Custom soon made such departures easy and natural. In this next great step, Taney was undoubtedly the leader by virtue of his decision in *Rowan v. Runnels*, and curiously enough his support of slavery seems to have had a part in pushing him in this direction. It is strange that the two great leaders in this undermining of State authority should have been Story and Taney. The former ranked himself with the republican or democratic party in his early days, but was dubbed by Jefferson as early as 1810 as a "pseudo-republican."⁵⁷ And Taney in all his active career classed as a democrat; indeed, he was beyond question, especially in later days, as the slavery issue became all-absorbing, in close accord with the powers which guided the democratic party.

I shall forbear in this paper to enter upon the decisions in more recent years. It would be impossible within its limits. They are so conflicting, so full of distinctions, that sound principle cannot be deduced from them, and one has always the feeling that the real motive directing the court is the determination to find in some way a reason for deciding the particular case as the chance majority may wish. That there are plenty of precedents to afford support to the majority of the court in *Kuhn v. Fairmont Coal Co.* is to my mind clear, but it would have been just as easy to enter the opposite judgment and to justify it, even under some of the few decisions cited in this article. No one can possibly tell in advance under existing circumstances, whether the Supreme Court will adhere in a particular case to the precedents for following the State rule or will pick out the contrary ones and follow them.

⁵⁷ Letter of July 16, 1810, to General Dearborn. Writings by T. J. Randolph, Vol. IV., p. 148.

The results of the doctrine of *Swift v. Tyson* and the other departures from principle we have been considering, have been very curious and were hardly foreseen by any one. The existence of two rules of property in the same jurisdiction, the one holding as to residents and the other as to non-residents, is not too strongly characterized, when it is called "a recurrence to barbarism." Ever since *Swift v. Tyson* was decided in 1842, two rules upon its subject-matter have prevailed in New York, for that State has adhered to its opinion as well as has the Supreme Court of the United States. The same is of course the case in all the instances of departure from the State rulings, and at this hour two rules exist side by side in West Virginia as to the question under discussion in *Kuhn v. Fairmont Coal Co.*

As is often the case with unsound principles, this one has led to tricks and subterfuges. Fraudulent assignments have been made, and doubtless still are made, so as to gain the right to sue in the Federal courts and secure a recovery under its rule, in reality by a citizen of the State, who has no right of recovery under the system of his home jurisdiction. Lawyers must often study deeply at the start of a litigation to decide in which forum their best chance lies, and then ingenious plans⁵⁸ are devised to establish the right to rest their chance on that color which seems most likely to win. But it is needless to go on. When once it is shown that two rules of property prevail side by side, surely no more is wanted.

One other unforeseen consequence must, however, be mentioned. If there be a code of general principles of

⁵⁸ See my prior article, pp. 482-84, and *Farmington v. Pillsbury*, 114 U. S. 138, and *Little v. Giles*, 118 U. S. 596, for some of the devices resorted to. In *Bucher v. R. R.*, 125 U. S. 555, the plaintiff brought suit and recovered a judgment. Upon a new trial being granted, however, he took a non-suit and

tried again in the U. S. courts. In *Stewart v. Lansing*, 104 U. S. 505, it is clear that no such human being as the plaintiff existed on earth. His name was invented and was then called a citizen of another State, in order to make an apparent case of a right to sue in the U. S. courts.

jurisprudence floating in mid-air, apart from any authority to enact or alter them, why should their elucidation be confined to the Supreme Court of the United States? It is not the only court, which is called upon on occasion to decide litigations arising in another forum, and the method of deciding which by Marshall has been shown. When an English court is called upon to decide a case which arose in France or in New York, it does precisely what Marshall did, apply the *lex loci contractus*. So the Supreme Court of the United States itself decides questions arising abroad. But our State courts, too, are often called upon to decide cases depending entirely upon the law of another State of our Union. How shall they decide them? The "general principles" sounded too attractive apparently to some minds to be left entirely to one court, and probably the State judges felt themselves as competent as any other to decide upon them; so they, in turn, began before long to refuse to follow the law system of the State where a case arose, and to decide in accordance with what the court of the forum might choose to think general principles.

Here is another element of grievous confusion and uncertainty, directly traceable to Story and *Swift v. Tyson*. The earliest of these cases that I have been able to find⁵⁹ is *Franklin v. Twogood*,⁶⁰ decided in 1868. It was, like *Swift v. Tyson*, a suit on a note, which had been made and negotiated in Wisconsin, and it was admitted that, under the decisions in that State, a perfect title free from

⁵⁹ It is extremely difficult to find the cases upon this branch of law. They seem to be digested, even in the same digest, under numerous heads, and evidently the writers were (naturally enough) at a loss where to put them. Nor have I been able to find many of them gathered together in any text-book, though a short space is devoted to their consideration in Wheeler's *Modern Law of Carriers* (1890), Chapter 8, pp. 200, 201; Rorer on *Interstate Law*, 2d Edition, 121, 122;

Hutchinson on Carriers, 3d Edition, 1906, Sec. 206; Wharton's *Conflict of Laws*, 3d Edition, by Geo. H. Parmele, pp. 947-51, 1106-07; Gray on the *Nature and Sources of the Law*, Secs. 535-44. I presume there must be far more cases than I have found, but have not felt it necessary to go further, as the purpose of this article is fulfilled by showing that the rule has been adopted in some States and urged in others.

⁶⁰ 25 Ia. 520.

the equities had been vested in the plaintiff by the acts of the parties. But the Supreme Court of Iowa holds that the rule of the common law as interpreted in Iowa, is different, and that they cannot be controlled by the Wisconsin decisions. The law merchant and *the common law*,⁶¹ they say, must be conceded to be the same in both States, and the only point is that the courts of the two States interpret it differently. We must decide for ourselves, they conclude, and then they decide the case in accordance with the Iowa rule and against the *lex loci contractus*. The decision seems to have created some surprise, and a re-argument was had, but the court adhered to its ruling, and filed a second opinion in which *Swift v. Tyson* is cited among other cases.

The next case in point of time that I have been able to find was decided in Illinois in 1874,⁶² but the new doctrine received no countenance. The case grew out of the loss of goods shipped by railroad in Wisconsin, under circumstances which constituted a defense by the decisions in Wisconsin, where the contract was made and was to be executed, but no defense by those of Illinois, where the suit was brought. The Illinois court, however, did not decide by the law of the forum, or in accordance with any supposed general principles, but applied the law as laid down by the Wisconsin courts. "The question," they say, "is not what is the common law of England or of this State, but what is the common law, in this respect, of Wisconsin?" To this rule the Illinois courts seem to have consistently held, the latest case being *Coats v. Chic. &c. R. W. Co.*,⁶³ decided in 1909.

"It is strange that the common law can be supposed to be the same in the different States, but this idea runs through many of these cases. It seems that the writers must have had in mind the old English common law (it might be asked, of what date?), but that law never had the slightest authority *per se*, nor was it ever in force in its entirety, in any one of the colonies or

States. Each one adopted only such parts of the English common law as it chose, and the common law of each colony was different from that of every other at any particular time during the colonial period, as well as today.

⁶² *Milwaukee R. Co. v. Smith*, 74 Ill. 197.

⁶³ 239 Ill. 154.

In New York, in 1880, in *Faulkner v. Hart*,⁶⁴ the general principles doctrine was distinctly applied. That was a suit against a common carrier growing out of the destruction by fire of goods shipped in New York for Boston, where they arrived late one evening and were stored by the carrier in its own warehouse, but burned that same night. Under the Massachusetts decisions, the liability was that of a warehouseman only, and hence under the facts of the case, there was no actual liability. Under the New York decisions, on the contrary, the carrier remains liable until actual delivery to the consignee, and his liability was complete. The case was clearly one to be decided ordinarily by the Massachusetts law, but it was ruled the other way on the ground that it depended on a question of general commercial law. *Swift v. Tyson* and the other federal decisions were cited and the opinion based upon them.

In Georgia, again, in 1886, in *Krogg v. R. Co.*,⁶⁵ the general principles doctrine was applied in a case depending on the common law. The case was a negligence one, growing out of an accident in Alabama, and turned on the question of fellow-servant or not. The court was urged to follow the Alabama decisions, but did not think them clear, and declined to follow them anyhow, on the ground that the question was one of common law. "As to what is the common law on this subject," the opinion tells us, "this court is not only competent to decide, although the accident happened in Alabama, but it is its duty to decide, the common law being the same in both jurisdictions." To much the same effect, also, is the case of *Atlanta & W. P. R. Co. v. Broome*,⁶⁶ decided in 1907. It is placed on two grounds, however. Coal had been shipped in Tennessee and Alabama under bills of lading which relieved the defendants from liability for a shortage that occurred, and these stipulations were perfectly valid in those States. The law of

⁶⁴ 82 N. Y. 413.⁶⁵ 77 Ga. 202.⁶⁶ 3 Ga. 641.

Georgia is, however, otherwise, and the court holds that they will not enforce the foreign law, because clauses to release common carriers from their negligence were against the public policy of Georgia. "Contracts which contravene the policy of our law," say the Court, "though valid at the place where made, will not be enforced by the courts of this State. . . . Especially is this true when the conflict arises not by reason of a statute of the sister State, but by reason of the fact that the courts of that State have construed the common law differently from what our courts have construed it to be."

In North Dakota, too, in 1909, in *Hanson v. Great Northern R. Co.*,⁶⁷ a question was presented, very similar to that in the last mentioned one, but there did not appear to be any decisions upon the question in the place of contract. The court holds the carrier's attempt to limit its liability void "both at common law and under the established rule of public policy of this State."

The cases heretofore examined include the only ones I know of actually following Story's rule, but they show that it has been adopted in Iowa, New York and Georgia, and there is at least an indication of its adoption in North Dakota. It has been already shown that it was rejected in Illinois, and in three other cases in three different States the Court was urged to adopt it, but happily declined. I refer to *Bridger v. R. Co.*,⁶⁸ and *McMaster v. R. Co.*,⁶⁹ both in 1887, and to *Forepaugh v. R. Co.*,⁷⁰ in 1889. In the last named case the Court was most strenuously pressed by leading counsel to make this new departure, but the contention met with little favor. "It is time to say plainly," writes Judge Mitchell,

"that it (the doctrine of a general commercial law) rests upon an entirely inadmissible and untenable basis. There is no such thing as a general commercial, or general common, law, separate from, and irrespective of a particular state or government, whose authority makes it law. . . . There must be a state or government of which every law can be predicated,

⁶⁷ 121 N. W. 78.

⁶⁸ 27 S. C. 456.

⁶⁹ 65 Miss. 264.

⁷⁰ 128 Pa. St. 217.

and to whose authority it owes its existence as law. Without such sanction, it is not law at all. . . . Such sanction it is the prerogative of the courts of each state itself to declare."

That the adoption of this new rule by the States was a most natural result of its creation by the United States Courts cannot be doubted, and it is equally clear that, up to this time at least, its existence in the federal courts and now in those of some of our States has resulted in little else than uncertainty of the law and some chicanery.

What is the cure for all this? Prof. Schofield thinks he has found one. It is that the United States Supreme Court, after it has rendered a decision on State law differing from that of the State courts (as in *Kuhn v. Fairmont Coal Co.*), shall assume appellate jurisdiction of and reverse all State cases adhering to their own interpretation of their own statutes, common law, or other part of their system, and thus force the State courts to follow the federal ruling. That the Supreme Court in our system have the power to do this, if they choose, is probably true, for impeachment is the veriest scarecrow, but such a step would certainly be judicial revolution and would be in the teeth of a thousand cases which have been incontinently dismissed for the reason that the record failed to show any federal question involved. *Pen. R. Co. v. Baugh*,⁷¹ seems to be an express decision against any such claim of right, and the hosts of cases dismissed for want of showing any federal question on the record, are only less so; see also *Delmas v. Insurance Co.*,⁷² decided in 1871.

But suppose the Supreme Court should thus set up the red flag of revolution, would the medicine work a cure? It is not at all clear how it would lessen the confusion resulting from the adoption by the State courts of the general principles doctrine,⁷³ but let us confine ourselves to its

⁷¹ 191 U. S. 477 (1903).

⁷² 14 Wall. 661.

⁷³ Possibly, the very recent case of *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, points out a

way in which the doctrine can be brought to an end in the State courts. It was a writ of error to the Court of Appeals of Kentucky in a negligence suit growing out of

results on the federal system. To say nothing of the ill effect of such a step on the court itself and in further raising hopes in every case that they might once more cut loose from principle and decide in the teeth of plain language, the very designer of this new panacea admits that the disease might well not even be relieved. For he sees—and even asserts, apparently so as to avoid curtailing too far “the independence of the States”—that the State legislatures may in such cases at once pass an act to abrogate in turn the principle established by the Federal courts. “The constitution,” he writes, “secures to the legislatures of the several States complete and perfect freedom to legislate any federal rule of judge-made State law out of their States, and to legislate in the opposing rule of judge-made State law declared or made by the State court.”⁷⁴

Confusion worse confounded! One rule to exist in a State under the interpretation of its own courts, another under that of the Federal courts, and then a third rule to be brought in under a State statute discarding the federal

an injury to an employe suffered in Indiana. The plaintiff had rested his case on an Indiana statute regulating the liability of railroads for injuries to employes, and it was asserted that the Kentucky court had interpreted the Indiana statute in a way different from the decisions thereon in Indiana. This was claimed to be a violation of the “full faith and credit” clause of the U. S. Constitution. The Supreme Court decided that this Federal question had not been properly raised on the record of the particular case, but all the discussion seems to assume that, if it had been, the case would have been reversed—*i. e.* that the decisions in the States as to the meaning of their statutes (and presumably as to their common law) are within the protection of the full faith and credit clause, and must be enforced in other States exactly as they would be in the State where rendered. It would be a most curious result, if the Su-

preme Court, a half century and more after it itself evolved the general principles, should now become the means of thus limiting their application.

“I quote these words, as they seem conclusive of their author’s opinion upon that point. Yet the very next sentence of Prof. Schofield asks, What is the use of the Uniform Negotiable Instruments Law. “If we have no constitutional means of securing a uniform judicial interpretation of it?” I think it is clear that we have none, and the language quoted in the text seems to demonstrate that such is Prof. Schofield’s opinion. The use of the various Uniform Acts is presumably to *approximate* uniformity on certain subjects as nearly as may be, but it cannot be *attained* under the system we inherited from our fathers. When material differences of interpretation arise under one of the Uniform Acts, the State Legislatures can be again called upon.

interpretation. And this later State statute to be again subject to interpretation—what Benton called “the legislative power improper”—by the same two sets of courts, very likely resulting in attributing to it quite different meanings and thus calling for a second or several State statutes, before the matter is finally settled. And to all this must be added the questions which would arise as to what cases, in point of date of origin, the State statute would apply to. It is to be presumed, under the well-known federal rule, that it would only apply to those arising after its date. It must be left to others to decide how many rules of property might then exist side by side.

Probably the United States Supreme Court may be trusted not to lend countenance to any such far-fetched design. In that case, Prof. Schofield would have Congress enlarge the court’s appellate jurisdiction over the State courts, “enabling it to give practical effect to Article VI of the constitution, and to the privileges and immunities clause and equal protection of the laws clause as applied to the conflicting judge-made laws of State and Federal courts.”

Leaving out of view for the moment all question as to the constitutionality of such a law, is it not at least gravely doubtful whether Congress would pass it? Many an M. C. is guided by what some think a narrow spirit and prefers to have his State regulate affairs for its citizens, and it does not seem likely that majorities could be secured for a proposal which would at one swoop imperialize our whole judicial system. There would from that day be not one single State Supreme Court left. All questions of the devolution of property and every other question that can arise would be reserved for the United States Supreme Court.

The difficulties in the way of this very revolutionary proposal are then immense. So are undoubtedly the difficulties in finding any other cure for the lamentable confusion. *Swift v. Tyson*, and some other excrescences have probably

stood too long to be overruled, but the worst of the two-rules-of-property result has flowed from the later cases always and even still today most grudgingly accepted by the court itself—as shown by the incessant dissents almost always accompanying the judgments for now over half a century. These later cases, too, are very conflicting, so that it would be easy in any case to find precedents and reasons for following the rule of law established by the only set of tribunals which can possibly be familiar with all the local customs and general considerations of the environment, to use the cant term of the day.

If, then, the strictly general commercial law doctrine of *Swift vs. Tyson* has stood too long to be now overruled, and if possibly some portion of the cognate general principles doctrine must also for the present remain to disfigure our jurisprudence, it is at least easy for the court itself to cease deciding cases under State statutes or under deeds and other muniments of title in the States in a way different from that which the State courts hold. *Kuhn vs. Fairmont Coal Co.* itself could very easily have been decided the other way. It involved for instance a question of land law, and land-law cases are the very ones in which the court has been especially slow to decide otherwise than does the State tribunal. If the majority of the court, however, will not today proceed thus to limit the effect of their unfortunate decisions, if they will still adhere to the rules which have let in this chaos, is not the only course open to the opponents of these decisions to keep on dissenting and protesting in the hope that new blood on the bench may yet some day see that the true course is to follow the State courts and thus at once largely rid our system of the horrid and disgraceful confusion which has grown up?

Possibly, too, the fact that *Kuhn v. Fairmont Coal Co.* was decided only by a majority of one is a hopeful sign that the court may even now be returning to some extent to the earlier rule of our great chief-justice. Numbers of cases could be found some twenty or thirty years earlier

in which almost unanimous judgments were rendered in such cases, and the result in the recent case is at least a hopeful sign of the times. It would probably be conceded by supporters of the decision that the soundness of a rule is to be doubted, when, sixty-two years after the first like decision was made in *Rowan v. Runnels*, the principle involved has gained so little recognition as to be barely able to secure a majority of the court today, and that in a case where the almost universal opinion seems to be that the decision in the State court was wrong, as measured by the overwhelming preponderance of Anglo-Saxon jurisprudence.

PHILADELPHIA.

WILLIAM M. MEIGS.

THE CAREER OF A COUNTRY LAWYER.

ABRAHAM LINCOLN.

(Continued from November-December).

The Springfield law office has been described many times. In the reminiscences of the late J. B. Bennett, of Cincinnati, published in *Rough Notes*,¹² appears this description of the man in his office:

"At the top of the stairway you directly entered a long room, destitute of every honest claim to be titled an office. It was a low, black schooner sort of an affair—dusty, dingy and destitute of ornament, unless the lawyer's old rusty stove, like the one-horse shay, ready to collapse, might be so construed. The front part of the room, while absolutely barren, was nevertheless impressibly full of emptiness. At the back part was a large pine table. On this table were a few law books, scattered in appropriate disorder. Towards the end of the table, uncommonly tall, stood a giant man intently reading a law book, impressing the spectator with the idea that the man was either too tall for the room or that the ceiling was too low for the man. The book he was reading was slightly inclined so as to catch the faint rays of light on the pages from a rear window. The shade and background of the whole with the sombre hue of the reader, made a very dark picture, and the man stood like a silhouette excepting a momentary flash of the eye which he gave to the intruder and then continued his reading. That glance of the eye was the only recognition or sign of life."

Mr. Arnold¹³ describes the man thus:

"Lincoln was six feet four inches in height and would be instantly recognized as belonging to that type of tall, large-boned men, produced in the northern part of the Mississippi Valley, and exhibiting its peculiar characteristics in the most marked degree in Tennessee, Kentucky and Illinois. In any court room in the United States he would instantly have been picked out as a western man. His stature, figure, dress, manner, voice and accent, indicated that he was of the northwest. In manner he was always cordial and frank, and although not without dignity, he made every person feel quite at his ease. I think the first impression a stranger would get of him, whether in conversation or

¹² Vol. 41, p. 78.

¹³ Isaac N. Arnold, "Reminiscences of the Illinois Bar, Forty Years

Ago," in Fergus' Historical Series, p. 145.

by hearing him speak, was, that this is a kind, frank, sincere, genuine man; of transparent truthfulness and integrity; and before Lincoln had uttered many words, he would be impressed with his clear good sense, his remarkably simple, homely wit and humor."

Mr. S. Wesley Martin, now living in California, in a recent address, has described Lincoln's manner and looks:

"He was a convincing speaker. He used no gestures, except occasionally he would extend his long right arm and point with his index finger at the people in a way that seemed to say, 'Don't you see!'

"I shall never forget how Lincoln was dressed. His coat was of black, glossy alpaca. It seemed to be several inches too short for him, and he buttoned the lowest button so that the upper part of the coat spread outward as if to make room for something to be tucked in at the sides. The hat was a tall stove pipe and had evidently seen many better days. . . . It looked as if a calf might have gone over it with its wet tongue."

When he appeared on the platform or in the parlor he showed his respect for his audience or his associates by dressing properly and in a way that would have been wholly incompatible with the dust or mire of the prairie roads.

Lincoln's reputation as a lawyer was made between 1840 and 1854. From traveling the Eighth Circuit and the counties adjoining he extended his practice into every part of the state until, with the added fame which his debates with Douglas in 1858 brought him, there were many points in Illinois where in every important case it was considered necessary to engage the services of Mr. Lincoln. One cannot overestimate the value of this hard life on the circuit, both as discipline developing the man's powers and as an avenue toward that extraordinary personal acquaintance which meant so much to him in his political struggles later on.

The Supreme Court was in session only a few days in the year, and the circuit court at Springfield sat for only a few weeks. Instead of spending the rest of his time at farming as many another lawyer did, he faithfully "rode the circuit" by stage and on horseback until he could afford a buggy, visiting at almost every term of court the

towns in the Eighth Circuit,¹⁴ which at that time included Springfield, Pekin, Bloomington, Decatur, Taylorville, Mt. Pulaski, Metamora, Clinton, Monticello, Urbana, Danville, Shelbyville, Livingston, and Paris. The courts in the fourteen counties commenced in September and continued until midsummer, sitting in each town from two days to a week. Besides these court towns in the Eighth Circuit, whither he followed Judge Treat and Judge Davis, he tried cases more or less regularly in almost as many adjoining towns.

This life on the circuit, hard as it was, with judge, lawyers, witnesses, hangers-on, and even prisoners, traveling and eating and sleeping together, the food unspeakable, and rest for nights unknown, must, nevertheless, have had its compensating joys. That was no ordinary company. Not unlike was it to the pilgrimage to Canterbury. There was David Davis, the companionable judge who knew the law and who loved a laugh. And there were Logan, the scholarly, and Stuart, the shrewd and kindly; Swett, the clever; and Browning, the handsome; and Lamon, the amusing; and Weldon and Gridley and Parks and Harmon and Ficklin and Linder and Whitney and Oliver L. Davis, and the best beloved Abraham Lincoln. Some of them traveled to only two or three counties, but Davis and Lincoln went the whole circuit, Davis because he had to, and Lincoln because he loved it.

"I well recollect", says Henry C. Whitney, "a term of court at Urbana, where a prisoner on trial for perjury, used to spend his evenings with us in the judge's room, and a term at Danville where a prisoner on trial for larceny not only spent his evenings in our room, but had his meals with us and took walks in our immediate company."

Leonard Swett says: "I rode the eighth judicial circuit with Lincoln for eleven years, and in the allotment between him and the large Judge Davis in the scanty pro-

¹⁴The 8th circuit included the counties of Sangamon, Tazewell, Woodford, McLean, Dewitt, Platt, Macon, Champaign, Vermilion, Edgar, Logan, Christian, Shelby and Moultrie.

vision of these times, as a rule I slept with him.. Beds were always too short, coffee in the morning burned or otherwise bad, food often indifferent, roads simply trails, streams without bridges and often swollen, and had to be swam, sloughs often muddy and almost impassable, and we had to help the horses when the wagon mired down, with fence rails for pries."

Naturally the business of a court that sat for only a few days and then adjourned for six months had to be crowded through in such a way as to afford scant opportunity for preparation. Thus the rule of the Macon circuit court (1840) reads: "All issues are required to be made up on call of the cause for trial."

And so Judge Davis had little patience with technicalities. "He kept the lawyers down to the merits," Whitney relates. "'It appears to me,' Swett once commenced, in an argument on demurrer. 'I don't care how it appears to you,' was the judge's tart response, 'Hand up your authorities, if you have any.'"

The lawyers were wont to follow the court from county to county, often without employment except what they picked up on arrival. Sometimes the harvest of cases would not pay the cost of the journey, and again, after a lawyer's reputation as a case winner had become established, the business would be all that could be desired.

The trip to Tazewell county, as shown by the docket, cost \$21.25. To extend it to Decatur and Danville and Paris, made the expense one which a less successful lawyer could not have afforded. The business that came to Lincoln on such a trip must sometimes have been disheartening. His first case at Decatur is *People v. Adkin*, in which the defendant, charged with larceny, having pleaded his inability to employ counsel, Judge Treat appointed Lincoln to defend. The trial, with Lincoln's kinsman, Hanks, on the jury, resulted in an acquittal. The only case at one term at Danville was *Murphenheim v. Scott* (1850), where the jury disagreed and the parties re-submitted the case and

by agreement suffered a verdict to be entered of \$7.50, each party to pay half the costs—a commendable settlement no doubt, but a meager feast to set before a lawyer who had traveled over a hundred miles across the prairie.

At the fall term, 1852, at Danville, Lincoln's entire calendar consisted of three small cases, a criminal appeal from a justice of the peace, a verdict in his client's favor for one hundred dollars, and a judgment by default on a note. At Paris, in the adjoining county the next week, his appearance is entered in nineteen cases, which, for a term of less than a week held one hundred fifty miles from home, is no mean showing.

One feature of Judge Davis' itinerant court was his "night sessions". The lawyers drawn to the town by the advent of the court, would find time hanging heavy on their hands and at the afternoon adjournment, would be notified to return after supper. This would bring together the best of the story tellers and the most entertaining of the talkers. Sometimes, to keep up the form of court proceedings and thus justify the so-called night sessions a mock trial would be put through which would give the lawyers who loved a practical joke the opportunity to get even with one another. It was at one of these sessions that Judge Oliver L. Davis tried Abraham Lincoln, on the criminal side of the court, for impoverishing the bar and his own household by charging unreasonably low fees and defending poor clients without pay. Tradition tells us that the judge let Lincoln off on what would now be called a suspended sentence but with a severe reprimand.

"At these meetings", says "Uncle" Felix Ryan, of Lincoln, Ill., "The lawyers would come to the court room and have fun together until the night was nearly gone. Many of the stories would be told by Mr. Lincoln. Judge Davis would sit there and pretend to read his docket until Lincoln would get him interested. I recall how Judge Davis' fat sides would shake with laughter as he said: 'Well, well, Mr. Lincoln, what next?'"

Squire J. T. Rudolph, of Lincoln, remembers when Judge

Davis would call them all together as if to try cases, and the people of the town (Mt. Pulaski) would crowd in to enjoy an evening's entertainment as provided by the lawyers. Ward H. Lamon, Lincoln's Danville associate in the practice, was a good singer and would mount the big walnut table and sing and dance to the delight of every one.

When the night sessions were not held, the bar would gather at the tavern, and, doubtless, to forget the misery of crowded beds and unspeakable meals, would keep the talk going all night long.

One of these taverns advertised, "Entertainment for Man and Beast", and like many of the rest discriminated in favor of the beast. Here, decent and vulgar men mingled in admired confusion. Money was won and lost at cards and stories hopelessly coarse had no less currency than those did whose wit and humor have made them immortal. To the promiscuous character of these gatherings is due no doubt the fact that a half-century later many stories are attributed to the civilized men of the company which never reached their ears.

It was during this period that an incident occurred of which Judge Blodgett, for many years United States judge, is said to have told. It had rained for days, and when the company of circuit riders came to a swollen stream, which seemed to be miles wide, Lincoln was the only one who knew the country well enough to act as guide. He saw his opportunity and agreed to conduct the party across if they would do exactly as he required. The pledge was given and every lawyer was compelled to strip, tie his clothes in a bundle, and, mounting his horse, follow the leader. This grotesque, naked company, including the cherubic figure of David Davis, and the giant form of Abraham Lincoln, wound its way up and down the stream on horseback, until, much as Moses led the hosts of Israel through the Red Sea without wetting a garment, Lincoln conducted them to dry ground on the farther side of what they supposed was a flood, but which at no time rose higher than a horse's knees. One can imagine Lincoln's laugh at

the threats of revenge which his associates uttered when they found what an absurd picture they had presented.

In many of these towns a few old men still live who tell with undiminished enthusiasm their recollection of that far-off time. Some of the communities are in few respects unlike what they were seventy years ago. Petersburg is still the home of the Rutledges, Greens, Clarys, and Armstrongs. And all over the circuit it is possible still to learn from men who knew Mr. Lincoln of incidents in his practice as yet unpublished.

"He was a very smart trial lawyer," Judge Lyman Lacey of Havana, relates. "As he went along in easy fashion, he admitted evidence offered by his opponents and conceded their points until it looked as if he had given his whole case away. 'I don't contest this point', Lincoln would say. 'O! I'll freely admit that.' But all the time there would be one or more strong lines of defense left, and, after waiving aside all that he had yielded, he would conclude: "But here, gentlemen, is the real point in this case, and on it we rest our defense."

Judge Samuel C. Parks has noted this characteristic. He says:

"In a closely contested case, in which he was assisting me, in his closing speech, he was extremely liberal in his admissions in favor of the defendant. We got a verdict for about two-thirds of our claim. I said to him: 'Lincoln, you admitted too much.' 'No', he answered, 'That's what gained the case.'"

It is not easy to take a series of pleadings and the skeleton of an argument as we find them sixty years after and get from them any picture of the comedy or tragedy which was enacted when such a case was tried. Much must be left to the imagination if the picture is to be drawn. But even to the imagination sometimes these old records suggest what may have happened. There is a case on the docket of Edgar County for 1850 entitled *Albin v. Bodine*, for slander. The record entries are: "Lincoln and Linder for defendant. Trial by jury. Verdict for defendant."

But in the files is a faded sheet of legal cap in Lincoln's hand, entitled "Brief", which sets out the synopsis of points for the argument to the jury. And every point seems to be for the other side. This brief is a rare document, for its author had a tenacious memory and seldom used any notes.^{14a}

One theory of the defense is that the defendant said all that he is charged with saying—"damned horse thief" and all—and that his counsel in one of his scathing philippics held the plaintiff up to deserved contempt, or by a series of brilliant sallies of wit laughed the plaintiff out of court. The other is suggested by the two latin words *crimen falsi* at the end and hints at an argument charging perjury. And yet all that the record shows is the use of language of the most slanderous sort and a verdict for the defense.

"I have sat on the jury in his cases," says Mr. Ryan. "He knew nearly every juror, and when he made his speech he talked to the jurors, one at a time, like an old friend who wanted to reason it out with them and make it as easy as possible for them to find the truth."

"He never talked long," says Mr. John Strong of Atlanta, Ill. "In stating a disputed proposition, he would say, not 'This is the way it is', but 'This is the way it seems to me,' thus allowing for an honest difference of opinion."

Judge S. A. Foley, of Lincoln, Ill., has a clear memory of his court room manner. "When Lincoln examined a witness or addressed a jury, he had a peculiarly winning way of doing it. In an opening statement, he seemed to

^{14a} Here are some of these points:

"1st. Albin stole Blady's horse out of my pasture last night. He is a horse thief and that is what he came here for.

"6th. You know you stole that horse and it is not the first horse you have stole; and I believe you follow the business.

"9th. He is a damned little horse thief and his business is horse steal-

ing, and he came here for that business and that is not the first horse he has stolen. He is a horse thief and I will send him to the penitentiary.

"Bennett Murphy. He told plaintiff he had stolen his horse.

"James Murphy. Dr. Albin stole the Priest's horse out of my pasture.

"*Crimen falsi.*"

take everybody into his confidence as though he proposed to keep nothing from them. In cross-examination he would first secure the witness' good will and then lead him gently along until he elicited from him the truth for which he was seeking. When he came to the argument he had something to say to each juror, and he led each one to believe that as attorney his only duty was to help the jury find the truth. Sometimes he made his points so plain with a story that there was no escaping his conclusion."

Judge Parks, who had a large practice while Lincoln was riding the circuit, and who is still living at Kansas City, said:¹⁵

"He was a great advocate and more successful at the bar than many men who knew more law than himself. . . . For this there were two reasons. One was that he was naturally fair minded, and, as a rule, would not advocate any cause which he did not believe to be just. Owing to this characteristic he would not knowingly take a case that was wrong, and if he ignorantly got into such a case he would generally refuse to prosecute or defend it after he had ascertained his mistake. He was intellectually honest. He would not advocate a cause in which he did not believe. He was the easiest lawyer to beat when he thought he was wrong that I ever knew. Soon after beginning to practice, I was employed to defend a man charged with larceny and Mr Lincoln was employed to assist me. I really believed at the beginning of the trial that the man was not guilty. But the evidence was unfavorable, and at its close Mr. Lincoln called me into the consultation room and said: If you can say anything that will do our man any good, say it. I can't. If I say anything the jury will see that I think he is guilty and will convict him.' And so I proposed to the prosecutor to submit the case without argument. This was done. The jury disagreed, and before the case could be tried again the man died.

"In the same county Lincoln brought suit on an account and proved it without any trouble. Defendant's attorney then produced a receipt in full from the plaintiff which clearly covered the account. Lincoln took the receipt, examined it till he was satisfied, and handed it back to the opposing attorney who proceeded to prove it; whereupon the presiding judge (Treat) inquired: 'What do you say to that, Mr. Lincoln?' But Lincoln had quietly left the court house and gone to his hotel. The court sent for him, but he declined to return, saying to the sheriff: 'Tell Judge Treat that my hands are dirty and I want to wash them.' Owing to this habit of not advocating a bad case he had the advantage of feeling that he ought to gain the cases that he did advocate. He also had

¹⁵ In a lecture before the University of Michigan.

the advantage of having the confidence of the court and jury at the outset and the fairness and skill to keep it to the close."

The leader of this itinerant bar, without whose presence no gathering of men was complete, was not always to be found. He had a way of going off after the companionship of children. One of these old-time little boys now describes the serious way in which Mr. Lincoln would call for their opinion on political questions, and interrogate them regarding their personal hopes and ambitions, and advise with them as if he considered them to be men of mature judgment. He was particularly given to trying to find what impression the young fellows had of his arguments and those of Douglas, seemingly bearing in mind the ideal of his own youth that he must make his meaning so plain that any boy he knew could comprehend. Another of these boys tells of the delicious way in which he talked foolishness to them as he joined in their games of marbles or handball.

Mr. George S. Cole, of Danville, now eighty years old, describes his first game of billiards over seventy years ago:

"Mr. Lincoln called me in to see the first billiard table, and said, 'Come on, Bub, let's play a game.' My awkwardness with the cue seemed to please him hugely."

"Nothing tickled him so much," says Uncle Felix Ryan, "as to get a prank on the boys. Once they stretched a rope across the walk, just high enough to catch his plug hat. He pretended to be very angry and ran all over the place until he had caught them all, making them think he was going to punish them, and then took them into the store and stood treat."

Sometimes the semi-annual session of court was the occasion of social activity of a more formal character. A reception or ball would draw the gentlemen of the bar away from court room and tavern and into real society. There are ladies still living, who, although young in spirit, are old enough to recall those old times. They remember that Mr. Lincoln, who seemed to care so little for his appearance in the street and in court, was yet in society "a gentleman of the old school", who arose at once when

a lady entered the room, and whose courtly manners would put to shame the easy-going indifference to etiquette which marks the twentieth century gentleman. One of them who must have been a belle in "the Fifties", loves to tell how many a pretty girl would lead her escort from the dance to the card room because she wanted to listen to Mr. Lincoln's talk.

Says Mr. Arnold:¹⁶ "I must not omit to mention the old-fashioned, generous hospitality of Springfield, hospitality proverbial to this day throughout the State. Among others, I recall the dinners and evening parties given by Mrs. Lincoln. In her modest and simple home, everything orderly and refined, there was always on the part of both host and hostess a cordial and hearty Western welcome which put every guest perfectly at ease. Mrs. Lincoln's table was famed for the excellence of many rare Kentucky dishes, and in season it was loaded with venison, wild turkey, prairie chicken, quail, and other game which was then abundant. Yet it was her genial manners and ever kind welcome, and Mr. Lincoln's wit and humor, anecdotes and unrivaled conversation, which formed the chief attraction."

The court room was not the only place where the lawyers made themselves useful. At Decatur, when the first piano was brought by wagon across the prairie, the adjournment of court, so Mrs. Jane Johns relates, furnished an anxious young lady with ample skilled labor to unload the big, delicate instrument. It was Mr. Lincoln who superintended the removal and his strong arms that lifted one end of the piano while a half dozen other brawny circuit riders handled the other end.

That was no day for specialists. The collection lawyer of seventy years ago won insubstantial rewards, although he did not hesitate to advertise for business. Even David Davis, soon to enter upon a long and brilliant judi-

¹⁶ Isaac N. Arnold, *Reminiscences of the Illinois Bar Forty Years Ago*; in *Fergus' Historical Series*.

cial career, advertised in 1837 in the Sangamon Journal: "Notes and accounts entrusted to him for collection will meet with a most prompt attention." And Lincoln, in collecting six hundred dollars from Stephen A. Douglas under circumstances embarrassing to both, set the "minimum fee" precedent by charging three dollars and a half for the service.

There are in circulation many authentic stories that were used by Lincoln to enforce an argument at law. But they have all been published long ago, along with many that are not authentic. Two of these are no doubt familiar, but they will serve to show Lincoln's method. They are reported by Miss Tarbell in her life of Lincoln and by Mr. Hill in his "Lincoln the Lawyer".

One of these is told by the late Judge Beckwith of Danville. Lincoln was trying to make plain to the jury the legal effect of self-defense. "My client," he explained, "was in the fix of a man who was carrying a pitchfork along the country road when he was suddenly attacked by a vicious dog. In the trouble that followed the prongs of the pitchfork killed the dog. 'What made you kill my dog?' the farmer cried in rage. 'What made him try to bite me?' 'But why didn't you go at him with the other end of the pitchfork?' 'Why didn't he come at me with the other end of the dog?' The jury saw what self-defense meant.

Mr. T. W. S. Kidd, for many years court crier at Springfield, says he once heard a lawyer arguing to the jury the controlling authority of precedent. When Lincoln's turn came to answer he took up the argument from precedent in this way: "Old Squire Bagley from Menard came into my office once and said: 'Mr. Lincoln, I want your advice as a lawyer. Has a man that's been elected a justice of the peace a right to issue a marriage license?' I told him no, and he threw himself back indignantly in his chair and said, 'Lincoln, I thought you was a lawyer. Bob Thomas and I had a bet on this thing, and we agreed to

leave it to you, but if this is your opinion I don't want it, for I know a thunderin' sight better. I've been a Squire now eight years and I have done it all the time.' "

He once characterized an ultra-technical judge by saying: "He would hang a man for blowing his nose in the street, but he would quash the indictment if it failed to state which hand he did it with."

The value he put upon simplicity is summed up in the remark he made to Herndon: "If I can clear this case of its technicalities and get it properly swung to the jury, I'll win it." From this it is by no means to be inferred that he did not respect the requirements of the practice, or make use of the technical points in a case where occasion required it. He was a practical, well-trained lawyer, who accepted all proper employments and gave to his clients the benefit of his extraordinary mental and legal equipment. In his early struggles in justices' courts, his discomfited opponents used to hint at pettifoggery, and in his supreme court arguments, he was willing to win on questions of practice and what careless lawyers and ignorant laymen call technicalities. Lawyers know that a neglect to take such advantage as the rules of the practice permit is a breach of the duty one owes to a client. And they know, too, that one who "plays the game" according to its rules may yet play fairly and honestly.

The traditions of Lincoln's humor in the trial of his cases are well established. In his early practice, particularly, he used his gifts as a raconteur and a mimic most effectively in demonstrating his points. The evidence of this is in the reminiscences of his colleagues and in oral tradition. Old men of middle Illinois still repeat his stories. The actual court record of his humor is very slight. I only know of two illustrations. One is a figure probably employed by him in presenting a point of law to the Supreme Court in St. Louis, etc. *Railway Company against Dalby*, 19 Ill. 353, and is buried in the mass of a profound opinion by Judge Caton at page 374. The other is a

bill for divorce, the original of which is in the possession of Mr. F. R. Fisher of Terre Haute, Ind. At that time no one had any good will for the negro. The bill is drawn in a jocular vein, referring to the defendant, who was a habitual drunkard, as "a gentleman of colour", and averring that the couple had lived together for many years, "though not in the highest state of connubial felicity."

Judge Gustave Koerner, who served on the Supreme bench in the early period of Lincoln's practice, recalls in his *Memoirs*, published last year, "the often quaint and droll language used by him" in his arguments in that court.

That he had the Bible at his tongue's end, and, knowing its value in any appeal he might make to the sympathy, or imagination, or reason of his audience, made use of it in his public utterances, is well known. That he made the same use of scripture in convincing his juries is a matter of tradition. To get the documentary proof of this has not been so easy. But in the files of the circuit court of Menard county, the papers in *Page v. Boyd*, tried in 1847, afford the proof that his use of the Bible in his closing speech was causing his opponent some uneasiness. It was a damage suit against Lincoln's client for injuries suffered by two mares that had strayed into the defendant's pasture and been used by defendant while in his custody. In the files, hurriedly scrawled on a scrap of paper by plaintiff's counsel, Mr. Robbins, is the following:

"Will the Court instruct the jury that the passage from Exodus read by the counsel in this case does not apply in this suit as law?"

This instruction is endorsed "Given." The record shows a verdict for plaintiff.

The passage referred to may have been Exodus XXII., 1-4.

Any lawyer of Lincoln's ability would have accumulated a comfortable fortune with such a practice. When

he left Springfield in 1861 he was fifty-two years old and the recognized leader of the Illinois bar. And yet, though living far from extravagantly, his entire estate was barely ten thousand dollars.

Mr. John W. Bunn, of Springfield, a client and friend, tells an incident which fairly illustrates Lincoln's idea of the value of his own services. George Smith and Company, Chicago bankers, had written to Mr. Bunn to get some one to look after their defense in an attachment suit involving several thousand dollars. Lincoln conducted the trial, and, winning it, charged them twenty-five dollars. They wrote back to Mr. Bunn: "We asked you to get the best lawyer in Springfield and it certainly looks as if you had secured one of the cheapest."

For defending a damage suit at Paris, involving three thousand dollars, Mr. Andrew J. Hunter says the fee charged Mr. Hunter's father by Usher F. Linder and Abraham Lincoln was fifteen dollars, paid in wild-cat currency.

The instances of his volunteer service, as in defending "Duff" Armstrong for murder, for friendship's sake, are not rare. When he had finished a case he seemed indifferent to any desire for adequate compensation. The joy of the contest had been his, and the satisfaction of having done his best. As for the fees, they were of little consequence.

His charge in the defense of McCormick v. Manny, a case involving some of the McCormick reaper patents, valued at half a million dollars, was two thousand dollars, and his fee in the case of McLean County against Illinois Central Railroad Company was five thousand dollars. His average yearly income when he left the practice is said to have been about three thousand dollars.

When he had finished his senatorial race against Stephen A. Douglas and paid his campaign assessment of five hundred dollars, he returned to take up the practice, which had become sadly demoralized. "It is bad to be

poor", he wrote in 1859, "I shall go to the wall for bread and meat if I neglect my business this year as well as last." To eke out his income he prepared a lecture which he delivered at a few places. But as a lyceum speaker, he was as free from the mercenary spirit as he was at the law. Mr. Robert D. McDonald, of Danville, tells how the young men of Pontiac engaged him to lecture at the Presbyterian church without agreeing on terms in advance. "When I came to settle with the speaker out of the receipts from a full house, Mr. Lincoln took the first ten dollar bill I handed him and threw up his hands as he protested, 'For Heaven's sake don't give me any more; ten dollars is all it is worth.' "

Mr. James S. Ewing commenced the practice of law at about the time of Lincoln's election to the presidency and is now in the practice at Bloomington. Probably no one now living is better qualified from personal knowledge and understanding to speak of Lincoln, the lawyer. He said:¹⁷

"When I first knew anything of courts Hon. Samuel H. Treat was the presiding judge of this circuit. He was appointed to the Federal bench and the Hon. David Davis became his successor and continued as the circuit judge until appointed by Mr. Lincoln as an associate justice of the Supreme Court of the United States. It was then the habit for such lawyers as possessed sufficient experience and ability to attract a clientage to follow the court around the circuit. Mr. Lincoln was of this number and, more than perhaps any other, was most constant and unremitting in his attendance.

"During these fifteen years I heard Mr. Lincoln try a great many law suits. The suits themselves often dealt with trivial matters, but great men were engaged in them. Mr. Lincoln was engaged in most suits of any importance. He was wonderfully successful. Mr. Lincoln was a master in all that went to make up what was called a jury lawyer. His wonderful power of clear and logical statement seemed the beginning and end of the case. After his statement of the law and the facts in any particular case we wondered either how the plaintiff came to bring such a suit, or how the defendant could be such a fool as to defend it. By the time the jury was selected, each member of it felt that the great lawyer was his friend and was relying on him as a juror to see that no injustice

¹⁷ Address at Bloomington, Feb. 12, 1909.

was done. Mr. Lincoln's ready, homely, but always pertinent, illustrations, incidents, and anecdotes, could not be resisted.

"Few men ever lived who knew, as he did, the main springs of action, secret motives, the passions, prejudices, and inclinations which inspired the actions of men, and he played on the human heart as a master on an instrument. This power over a jury was, however, the least of his claims to be entitled a good lawyer. He was masterful in a legal argument before the court. His knowledge of the general principles of the law was extensive and accurate, and his mind so clear and logical that he seldom made a mistake in their application."

The best of Lincoln's earlier biographers was Isaac N. Arnold, a lawyer of no mean ability, and a member of Congress from Illinois during the Civil War and afterwards. This is his estimate:

"Lincoln was, upon the whole, the strongest jury lawyer in the State. He had the ability to perceive with almost intuitive quickness the decisive point in the case. In the examination and cross-examination of a witness he had no equal. He could compel a witness to tell the truth when he meant to lie, and if a witness lied he rarely escaped exposure under Lincoln's cross-examination. He could make a jury laugh and often weep at his pleasure. His legal arguments were always clear, vigorous and logical, seeking to convince rather by the application of principle than by the citation of cases. A stranger going into court when he was trying a cause would, after a few moments, find himself on Lincoln's side and wishing him success. He seemed to magnetize every one. He was so straightforward, so direct, so candid, that every spectator was impressed with the idea that he was seeking only truth and justice. He excelled in the statement of his case. However complicated, he would disentangle it and present the real issue in so simple and clear a way that all could understand. Indeed, his statement often rendered argument unnecessary, and frequently the court would stop him and say: 'If that is the case, Brother Lincoln, we will hear the other side.' His illustrations were often quaint and homely, but always apt and clear and often decisive. He always met his opponent's case fairly and squarely, and never intentionally misstated law or evidence."

No one knew Lincoln the lawyer better than David Davis, once judge of the Eighth Circuit and then associate justice of the Supreme Court of the United States. He said:

"I enjoyed for over twenty years the personal friendship of Mr. Lincoln. We were admitted to the bar about the same time and traveled for

¹ Isaac N. Arnold, *Life of Abraham Lincoln*, p. 84.

many years what is known in Illinois as the Eighth Judicial Circuit. In 1848, when I first went on the bench, the circuit embraced fourteen counties, and Mr. Lincoln went with the court to every county. Railroads were not then in use, and our mode of travel was either on horseback or in buggies. Mr. Lincoln was transferred from the bar of the circuit to the office of President of the United States, having been without official position since 1849. In all the elements that constitute a great lawyer Mr. Lincoln had few equals. He was great both at *nisi prius* and before an appellate tribunal. He seized the strong points of a cause and presented them with clearness and great compactness. His mind was logical and direct, and he did not indulge in extraneous discussion. His power of comparison was large and he rarely failed in a legal discussion to use that mode of reasoning. The framework of his mental and moral being was honesty, and a wrong cause was poorly defended by him. In order to bring into full activity his great powers, it was necessary that he should be convinced of the right and justice of the matter which he advocated. When so convinced, whether the cause was great or small, he was usually successful. He hated wrong and oppression everywhere, and many a man whose fraudulent conduct was undergoing review in a court of justice has writhed under his terrible indignation and rebuke."

In the Douglas debates, in his first inaugural address, and in the emergencies of the civil war, of which the Mason and Slidell incident is a type when he had to overrule his advisers and render his own final judgment, and in every significant utterance as president, are to be found the proof of the trained lawyer. With politics and history this paper has nothing to do. It is the country lawyer whose career we have been studying. To the question, who taught the author of the Gettysburg oration and the Second Inaugural, and whence came that simplicity of style? we have sought our answer in the story of his career at the law, of how he began, as a boy, with the determination to put his thought "in language plain enough for any boy he knew to comprehend"; of the influence of his public-spirited teachers, the opportunities he had in the Black Hawk war and in the legislature to know the men who were to control public opinion in the new State, the value of a gigantic physical strength which enabled him to endure the hardships of the life on the circuit and thrive upon them, and how in all these experiences two ambitions controlled him—to master the study

of human nature, and to express his thought in "language plain enough for any boy he knew to comprehend."

Men of America have erected a shrine for Abraham Lincoln. Some love best to think of him as he appealed to his "dissatisfied fellow countrymen" in 1861; others, as he dedicated the national cemetery at Gettysburg. The boys who wore the blue and who are now wearing the gray of God's providing, think of him as the "Father Abraham" of the armies of the Union. To others there comes the picture of the man of sorrows whose only cheer came when he could pardon a soldier boy. To still others he is the emancipator of the slaves. It is no less a man whose picture we see today—in fancy or in memory—the simple-minded country lawyer, who loved the children, and who understood human nature as he studied it in the uncouth countrymen of a prairie frontier. As he stood outside the court house, long after court had adjourned, explaining things to his neighbors and friends who gathered, as they always did, to hear his talk, we can see his giant figure with its earnest, kindly face traced in the twilight of an autumn evening against the rude brick walls, the figure of Lincoln the country lawyer, trusted and loved by all who knew him.

INDIANAPOLIS, IND.

CHARLES W. MOORES.

CURRENT TOPICS AND NOTES.

OUR CONTRIBUTORS.—FREDERIC J. STIMSON, the author of "The Law of Combined Action or Possession," is a native of Massachusetts, a graduate of Harvard in arts and law; has been Assistant Attorney-General and Commissioner on Uniform State Laws, and is Professor of Comparative Legislation in Harvard University. He is senior member of the law firm of Stimson & Stockton of Boston, a member of many societies and clubs; and has made a name in literature, being the author of two well-known works of fiction, *The Crime of Henry Vane*, and *First Harvests*, and of one of the best short stories in the English language—*Mrs. Knollys*. But he is known best to the bar as the compiler of a *Digest of American Statute Law* in two volumes and as the writer of *The Law and the Constitution* and *Popular Law Making*. Mr. Stimson's article was prepared for the annual address at the last meeting of the Indiana Bar Association.

E. M. GROSSMAN, the writer of the paper on "The Growing Disrespect for the Law" is a graduate of Harvard Law School and has been a practicing lawyer in St. Louis since 1897. He is attorney for the Board of Education of Saint Louis.

WILLIAM M. MEIGS, the author of "Decisions of Federal Courts on State Laws," was born in Philadelphia in 1852, received the degrees of B. A. and A. M. from the University of Pennsylvania, and was admitted to the bar in Philadelphia in January, 1879. He is the writer of an article on "The Relation of the Judiciary to the Constitution" (*American Law Review*, Vol. 19, March-April, 1885, p. 175); he also edited the late Brinton Coxe's *Judicial Power and Unconstitutional Legislation*, and has been the author of other articles upon law subjects, several of which have appeared in this magazine. The latest of these contributions is contained in the Sept.-Oct. number for 1906 (Vol. 40, page 641, *et seq.*) under the title of "Some Recent Attacks on the American Doctrine of Judicial Power." Mr. Meigs is also the author of *The Growth of the Constitution*, a work tracing the daily growth in the Federal Convention of each clause of the United States Constitution, and also of *Lives of Josiah Meigs, Charles Jared Ingersoll, and Thomas H. Benton*.

CHIEF JUSTICE WHITE.—The appointment of Edward Douglass White to be the ninth Chief Justice of the United States has given universal satisfaction in all parts of the country. Chief Justice White was born in Louisiana in 1845, was educated in Jesuit schools and Georgetown College in the District of Columbia. In 1868 he was admitted to the Bar of Louisiana, became a State Senator in 1874 and an Associate Justice of the Supreme Court of Louisiana in 1880. Later he was elected a United States Senator from Louisiana, and it was while holding this office that he was appointed by President Cleveland, in 1894, an Associate Justice of the Supreme Court of the United States to succeed Mr. Justice Blatchford. His career on the bench has been notable and he has been recognized as the strong man of that galaxy of great jurists. It is this which has caused his elevation, in spite of precedent and what politicians might term expediency—for he is the first Chief Justice to be promoted from the position of associate; he is a Roman Catholic and a Democrat and an ex-Confederate soldier. The bar of the land extends to its new Chief Justice its heartiest congratulations and wishes him happiness and length of days in his exalted position.

MR. JUSTICE HUGHES.—Charles Evans Hughes, whose latest photograph we present to our readers this month, was born in New York in 1862, and was educated at Colgate College, Brown University and Columbia University, at the last of which he obtained the degree of LL. B. He was admitted to the New York Bar in 1884 and except for a couple of years, when he was professor of law in the Cornell Law School, he was a practitioner in New York City until his election to the governorship of New York State in 1906. His second term had less than a year to expire when he was appointed by President Taft last fall to an Associate Justiceship of the Supreme Court of the United States. The great Reform Governor is still a young man and may hope to give many years of splendid service to the nation.

THE NECROLOGY OF 1910.—The deaths in one year of two Judges of the highest court of the nation, one of them its presiding officer, marks in a striking way the legal necrology of 1910. The passing away of Chief Justice Fuller and Mr. Justice Brewer, the resignation, through ill-health, of Mr. Justice Moody, and the death, in 1909, of Mr. Justice Peckham have given President Taft the responsibility of selecting, during the first part of his term, of almost a majority of the most august judicial tribunal in the world.

The Federal bench has likewise lost Albert C. Thompson of Ohio and Edward Whitson of Washington, and the Federal bar,

Lloyd W. Bowers of Illinois, Solicitor General of the United States, and who, had he lived a few months longer, would doubtless have attained a seat on the Federal Supreme bench. George H. Williams of Oregon, President Grant's Attorney-General, once nominated by him for Chief Justice, but fortunately rejected by the Senate, dies more than a quarter of a century later, almost forgotten by the public and the bar.

In Missouri the decease within the last three months of two Chief Justices of the State, James D. Fox and Gavon D. Burgess, has turned over to another political party the domination of the Supreme Court in which it has been in a minority for over thirty years.

Among well-known State judges of courts of last resort who have died during the past year are Benjamin D. Magruder of Illinois, who wrote the opinion in the celebrated Anarchist Case; Thomas B. Turley of Tennessee, afterwards a United States senator; Edward T. Bartlett of New York; John Lathrop of Massachusetts; William H. Upson of Ohio; Thomas Wilson of Minnesota; James B. Belford and Robert W. Steele of Colorado; M. L. Maginnis of Wyoming; B. L. D. Guffey of Kentucky; John S. Barkalow and James B. Dill of New Jersey; James E. Shepherd of Maryland; George R. Melburn of Montana; Charles F. Stone of New Hampshire; T. H. Woods of Mississippi; Horace Hemenway of Arkansas; W. D. Bean of Tennessee; and William P. Bynum of North Carolina. Other judges of inferior courts, but of more than local reputation, are Edward Patterson, Charles Donohue, Edward L. Fursman and Charles H. Truax of New York; James Aldrich of South Carolina and Thomas B. Womack of North Carolina.

From the bar New York loses her former Governor and Senator, David Bennett Hill; who was for many years an active practitioner; and Virginia her representative in the Senate for more than two decades, John W. Daniel, whose reputation as a lawyer was national and whose great work on negotiable instruments forms with that of another southern senator of an earlier day, Benjamin on Sales, the South's greatest contributions to modern legal learning. A noted Kentuckian has passed away, John C. Carlisle, Speaker of the House of Representatives, United States Senator and Secretary of the Treasury in the Cabinet of President Cleveland. Other lawyers of reputation who died in 1910 are Sylvester Dana, the oldest member of the New Hampshire bar; D. H. McIntyre, probably the Nestor of the Missouri bar, and Attorney-General of the state, before many of its present lawyers were born; James Barr Ames, the Dean of Deans of American Law Schools; John L. Beveridge, once Governor of Illinois; Henry Crawford, Edward C. Ritscher and E. B. Sherman of Illinois; John A. Kasson of Iowa and Lambert Tree of Illinois, diplomats as well as lawyers; J. Wade McDonall and John C. North of California;

Walter B. Clarkson of Florida; James P. Helm of Kentucky; Samuel L. Gilmore and F. L. Zachrie of Louisiana; John C. Cobb and Charles P. Mattocks of Maine; Julian J. Alexander and Richard M. Venable of Maryland; Frank D. Allen and Samuel D. Warren of Massachusetts; Ashley Pond of Michigan; Jacob Klein, Henry T. Kent and V. H. Roberts of Missouri; W. W. Dixon of Montana; William A. Walker and Charles L. Burr of New York; J. C. Flanders of Oregon; Calvin H. McCauley, Edmund D. North, John I. Rogers, Edward N. Willard and Simon P. Wolverton of Pennsylvania; Maurice H. Moore of South Carolina; Edmund D. Baxter of Tennessee; B. B. Munford, Daniel A. Grimsley and William B. Robertson of Virginia, and Joshua Stark of Wisconsin.

Canada loses a former judge of the Supreme Court of New Brunswick, George T. Gregory; France, Henri Baroux, eminent advocate and author, and England, Mr. Justice Walton of the King's Bench Division of the High Court of Justice.

PRESIDENT TAFT AND LAW REFORM.—In his message to Congress in December last, President Taft again calls its attention to Reform in our Legal Procedure, saying:

One great crying need in the United States is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment. Under present conditions the poor man is at a woeful disadvantage in a legal contest with a corporation or a rich opponent. The necessity for the reform exists both in United States courts and in all State courts. In order to bring it about, however, it naturally falls to the general government by its example to furnish a model to all States.

He points out that while the Supreme Court of the United States has the power to frame rules of equity practice for the Federal Courts, it has practically done nothing in this line for over a hundred years. May we not expect that the new judges just appointed may be able to induce their brothers to look at this matter a little and to simplify a procedure which, in patent and copyright cases especially is a scandal in the administration of justice. He urges that our highest Federal tribunal should be relieved from unnecessary appeals.

"No man," he says, "ought to have, as a matter of right, a review of his case by the Supreme Court. He should be satisfied by one hearing before a court of first instance and one review by a court of appeals. The proper and chief usefulness of a supreme court, and especially of the Supreme Court of the United States, is, in the cases which come before it so to expound the law, and especially the fundamental law—the Constitution—as to furnish precedents for the inferior courts in future litigation and for the executive officers in the construction of statutes and the performance of their legal duties. Therefore, any provisions for review of cases by the Supreme Court that cast upon that court the duty of passing on questions of evidence and the construction of particular forms of instruments, like indictments, or wills, or contracts, decisions not of

general application or importance, merely clog and burden the court and render more difficult its higher function, which makes it so important a part of the framework of our Government. The Supreme Court is now carrying an unnecessary burden of appeals of this kind, and I earnestly urge that it be removed."

The President endorses the recommendations of the American Bar Association through its committee of fifteen, and the bills now before Congress embodying those recommendations. He urges the passage of a law regulating the issuing of injunctions, and asks that the salaries of the Federal Judges be increased. He says:

I further recommend to Congress the passage of the bill now pending for the increase in the salaries of the Federal judges, by which the Chief Justice of the United States shall receive \$17,500 and the Associate Justices of the Supreme Court \$17,000; the circuit judges constituting the circuit court of appeals shall receive \$10,000, and the district judges \$9,000. These judges exercise a wide jurisdiction, and their duties require of them a profound knowledge of the law, great ability in the dispatch of business, and care and delicacy in the exercise of their jurisdiction so as to avoid conflict whenever possible between the Federal and the State courts. The positions they occupy ought to be filled by men who have shown the greatest ability in their professional work at the bar, and it is the poorest economy possible for the Government to pay salaries so low for judicial service as not to be able to command the best talent of the legal profession in every part of the country. The cost of living is such, especially in the large cities, that even the salaries fixed in the proposed bill will enable the incumbents to accumulate little, if anything, to support their families after their death. Nothing is so important to the preservation of our country and its beloved institutions as the maintenance of the independence of the judiciary, and next to the life tenure an adequate salary is the most material contribution to the maintenance of independence on the part of our judges.

It is to be hoped that Congress will take this view of the matter. If our representatives should go as far as this in remunerating the Federal judiciary, and pass this bill, we, the richest nation in the world, will be actually paying our Federal Court judges nearly half as much as the people of England pay their trial judges and not quite as much as the citizens of the City of London pay their municipal judges.

THE LAW'S DELAY (*Continued*).¹—8. In 1898 Scott Bibb, a Negro, filed in the Supreme Court his petition for a mandamus to compel the city authorities of the City of Alton to admit his two children, Minnie Bibb, then seven years old, and Ambrose Bibb, then eight years old, to a public school in that city. Issues of fact having been made by the pleadings the Supreme Court, following its previous practice in such cases, which practice had prevailed for about eighty years, sent the issues to the Circuit

¹ Continued from last number, Vol. 44. page 910.

Court of Madison County for trial by jury. A trial being there had it resulted in a verdict against the petitioner, which verdict, being certified to the Supreme Court, was set aside. (People ex rel. vs. Mayor, etc., of Alton, 179 Ill., 615.) Six subsequent trials by jury were had in the Circuit Court in two of which the juries disagreed and in the other four of which verdicts were rendered in favor of the respondents. (People ex rel. v. Mayor, etc., of Alton, 193 Ill. 309; People ex rel. v. Mayor, etc., of Alton, 209 Ill. 461; People ex rel. v. Mayor, etc., of Alton, 221 Ill. 275; People ex rel. v. Mayor, etc., of Alton, 233 Ill. 542.) Each verdict in favor of the respondents prior to the last one was set aside by the Supreme Court and an order made sending the issues back to the Circuit Court for another trial. When the last verdict came before the Court in 1908, ten years had elapsed since the commencement of the suit and Scott Bibb's daughter Minnie had reached the age of seventeen years and his son Ambrose had reached the age of eighteen years. The Court then, for the first time, discovered that there was no constitutional right of trial by jury in a mandamus case originally brought in the Supreme Court, and, finding that the last verdict rendered by the jury was plainly and palpably against the evidence in the case, the Court set it aside, found that all the material facts alleged in the petition were true and that the relator was entitled to the writ of mandamus prayed for, and ordered the issuance of the writ, in and by which the city authorities of Alton were commanded to admit the then grown-up children of the relator to the public school in question. Two of the judges of the Supreme Court dissented from the judgment on the ground that the parties had a constitutional right of trial by jury in a mandamus case brought originally in the Supreme Court.²

This case needs no comment. *Res ipsa loquitur*. It may be remarked, however, in passing, that after it had been commenced, but before it was finally decided, the Court held that it was vested with a sound legal discretion as to whether it would exercise its original jurisdiction in mandamus cases, and determined it would only exercise it for the protection of the rights, interests and franchises of the State and the rights and interests of the public, to enforce performance of high official duties affecting the public at large, and, in emergencies, in cases affecting local public interests or private rights, when there was no other adequate remedy and when the exercise of such jurisdiction was necessary to prevent a failure of justice; and this conclusion of the Court was based mainly upon the proposition that when, in a mandamus case, an issue of fact was made up, it became necessary to certify the case to an inferior court for trial by jury, thus occasioning unnecessary delay and inconvenience to the Supreme Court and to the parties

² People v. Mayor of Alton, 233 Ill. 542, Id.

interested. (People ex rel. Kocourek vs. City of Chicago et al., 193 Ill., 507; People ex rel. Taylor vs. Board of Education, 197 Ill., 43.)

9. In July, 1901, Michael McAndrews was severely injured by reason of certain cars being thrown by a locomotive engine under the control of the servants of the Chicago, Lake Shore and Eastern Railway Company against a car which he was unloading. For the purpose of bringing and prosecuting an action against the railway company he employed an able lawyer, who, in February, 1902, filed a declaration containing one count. In November, 1903, more than two years subsequent to the date of his injury, it having been discovered that the declaration was defective, and that it did not state a cause of action, it was amended by the filing of two additional counts. To these counts the defendant filed pleas of the statute of limitations and, a demurrer having been interposed to these pleas, the Court sustained it and a trial of the case was had upon the merits, with the result that the plaintiff recovered a judgment for \$12,000. Upon appeal to the Appellate Court of the first district this judgment was reversed on the ground that the statute of limitations presented a good defense to the additional counts to the declaration and a judgment was rendered in that court in favor of the defendant. Upon a writ of error from the Supreme Court this judgment was affirmed. The result of the decisions was that the plaintiff, a poor laboring man, crippled for life, and legally and justly entitled to \$12,000 as compensation for his injuries, was not only defeated of his right to recover, but had a judgment for costs entered against him and in favor of the corporation to blame for his injury. This occurred through no fault of his own, but merely because of a mistake of his lawyer, a mistake the correction of which would have worked no injury or injustice to the defendant.³

10. In August, 1906, Lillian Walters was injured by reason of a defective sidewalk over which she was passing in the City of Ottawa. In the following month she filed with the city attorney and the city clerk the notice in writing which the law required her to file, giving her name and residence, the time and place of the accident, and the name and address of her attending physician. She employed competent and able lawyers, who brought suit in the Circuit Court in the same month and filed a declaration consisting of three counts. Neither of these counts contained any reference to the notice. The city pleaded the general issue to the declaration, but, on November 20, 1907, more than a year after the plaintiff's injury and the commencement of the suit, withdrew its plea and filed a demurrer to the declaration, which was sustained. The plaintiff's attorneys thereupon amended the declaration by adding to each count averments showing the giving of

³ McAndrews v. Chicago & R. Co., 222 Ill. 232.

the notice and setting out copies thereof. The city again pleaded the general issue and also the one-year statute of limitations. The Court sustained the demurrer to the plea of the statute of limitations and thereupon the case was tried with the result that the plaintiff obtained a verdict and judgment for \$1,000, which, upon appeal, the Appellate Court affirmed. Upon further appeal to the Supreme Court the judgments of the Circuit Court and Appellate Court were reversed and it was held that the statute of limitations barred the plaintiff from recovering. So this woman, who had a good cause of action for which she was entitled to recover \$1,000, who notified the city promptly of her injury as the law required, who employed competent and able lawyers and commenced her suit within thirty days after her injury, was finally denied justice, not for any fault of her own, but because her lawyers, able and competent as they were, could not foresee that the Supreme Court of the State would decide that it was necessary to set forth in the plaintiff's declaration the giving of the notice referred to.⁴

11. In December, 1905, Ruth Klinkrath, then twelve years and eight months old, was injured while playing with other children upon a railroad turntable. To recover damages for her injury, she brought an action by her next friend in the Circuit Court against the railroad company. The trial resulted in a judgment in favor of the plaintiff for \$2,000, which judgment the Appellate Court of the third district affirmed. Upon a further appeal to the Supreme Court it was urged by the defendant that the trial court erred in giving the following instruction to the jury on behalf of the plaintiff:

"You are instructed that if you believe, from the evidence, that the plaintiff did exercise such care and caution as children of her age, capacity and intelligence are capable of exercising under the same circumstances, then the plaintiff cannot be charged with the want of reasonable care for her own safety."

It was objected that this instruction was erroneous because it did not require of the plaintiff the exercise of such care and caution "as children of her age, capacity, intelligence and *experience* are capable of exercising under the same circumstances," and it was insisted that the omission of the word "experience" required the reversal of the judgments of the Circuit and Appellate Courts. Five judges, the two other dissenting, so held and the judgments of the Circuit and Appellate Courts were reversed accordingly.

The plaintiff in this case, being a mere child, was incapable of protecting her own rights in or out of court. If the judge of the Circuit Court and the judges of the Appellate Court were incapable of detecting the legal difference between care which

⁴ Walters v. City of Ottawa, 240 Ill. 259, Id.

could be exercised by a child of the plaintiff's "age, capacity and intelligence," and that which could be exercised by a child of her "age, capacity, intelligence and experience," it was not her fault. Yet this mistake, if it was a mistake, of these four judges (which mistake, it must not be forgotten, two judges of the Supreme Court also labored under) was the means of inflicting upon this crippled child the costs incurred by the railroad company in the appeals to the Appellate and Supreme Courts, and the further costs and expenses she would be compelled to incur in another trial by jury, to be followed, in case of her success, by further appeals to the Appellate and Supreme Courts. Would it not be well to provide by statute, or, if necessary, by constitutional amendment, that the costs of mistakes made by judges as to the law shall be paid either by the judges themselves or out of the State treasury and not be imposed upon cripples or widows or children who bring suits in our courts? Might it not also be well to amend the Constitution so as to provide that circuit judges, in addition to being twenty-five years of age, residents of the State for five years next preceding their election and residents of the circuits in which they are elected, shall, like petit jurors, be persons "of sound judgment, well informed, and who understand the English language"?

How bright and intelligent must have been the twelve jurors in this case if they perceived this exceedingly fine point, which though it was seen by five judges of the Supreme Court, was not apparent to the other judges of that Court, the three judges of the Appellate Court, or to the judge of the Circuit Court who presided at the trial! Is it not a travesty upon justice for five judges, in a simple case like this, to overrule six other judges presumptively of equal intelligence with themselves, and reverse a judgment for the omission from an instruction of a word the insertion of which every one must be satisfied, to a moral certainty, could not have affected the verdict of the jury?³

12. A man was driving along the highway in a wagon on a load of hay when he was knocked from it by an overhanging telephone wire which had been negligently allowed to fall down, and permanently injured. He sued the company and proved the injury and the negligence. The jury found for the plaintiff and assessed damages to compensate him for the injury. The defendant took an appeal, and, for the first time, before any court, raised the question of the sufficiency of the averments of the petition. The Supreme Court, two or three years after the suit was instituted, reversed the case on the ground of the insufficiency of the averments, holding that the complaint, bad in this particular, without regard to whether the record showed a fair trial and just result. It ruled that an allegation that plaintiff was driving along and upon said street on a load of baled hay, and without sec-

³ Lake Erie, etc., R. Co. v. Klingrath, 227 Ill. 439, Id.

ing or knowing the condition of said telephone wire, he drove against and was caught by said wire and was thrown from his wagon, does not show that plaintiff was thrown because of such wire, on account of the absence of the averment that he was thereby thrown. Before the case reached a second judgment the plaintiff died, and his action died with him and "he appeared before the Judge of all Judges, who heard him and judged him according to his merits, without searching the record to find whether his attorney was skilled in technicalities, and whether his plea was by direct averment or by way of recital or stated conclusions."⁶

13. The plaintiff, a woman, had been at a hospital in St. Louis for some time as a patient and had so far recovered from a serious operation as to be able to return to her home. But she was still very weak and ill. And through an attendant a bargain was made with a livery stable (the defendant) to carry her home. A carriage soon arrived, with a colored driver, and on the morning of February 12, 1908, she was assisted down the steps of the hospital and to the carriage by a nurse and her sister. Upon entering the carriage she personally paid the driver and he was instructed as to her destination. After having progressed to within five or six blocks of plaintiff's residence the driver stopped the carriage and notified her that it would be impossible for him to complete the journey, in view of the muddy condition of the streets. All of the way, except the last few blocks, the streets were solid enough, but were unmade and muddy for six or eight blocks next to plaintiff's residence. The carriage had passed through several mud holes of considerable proportions when the driver notified plaintiff and her sister that he would not complete the journey, and inquired if plaintiff could not walk the remainder of the way. They told him that it was utterly impossible for her to walk, in view of her enfeebled condition and suggested that he might procure another conveyance and complete the transit. Whereupon the driver left them in the carriage and went to a telephone, and on returning to the carriage informed plaintiff and her sister that the "boss" said for him to return them to the hospital and not attempt to proceed further through the mud. Plaintiff replied she was not able to take the long drive back to the starting point and requested the driver to procure a lighter conveyance and continue the journey, as it would be impossible for plaintiff in her condition to return to the hospital. The driver went a second time to the telephone and coming back again told plaintiff that the "boss" said he was to bring plaintiff to defendant's livery barn and there transfer her into a storm buggy, by means of which she would be conveyed to her home. Plaintiff again told the driver that her condition was such she was unable

* "Lawyers and Courts," citing 170 Ind. 543, *Cassius C. Hadley*, Proceedings Indiana Bar Assn., 1909.

to withstand the strain of the trip. The driver was very rude throughout and eventually by the aid of a passing boy the plaintiff got word to the family grocer who came in the course of an hour with an open one-horse surrey and took the woman home. But by her long wait in the carriage and the ride in the open wagon she contracted a severe cold which resulted in a severe illness. For the breach of the contract with her, the plaintiff sued the defendant for damages.⁷

Now there is nothing difficult in this case. Whether the liveryman was a common carrier or not was immaterial, for whatever you may call him, he had made a contract to do a certain thing, viz., carry the plaintiff to her house, and he had not done so. The performance was not "impossible"; at the most it was merely more difficult on account of the state of the roads than perhaps the defendant contemplated. But that was no excuse. It was such a case as any judge should be able to decide at once after hearing the evidence on both sides, both as to the liability and the amount which should be awarded to the plaintiff. But on May 31, 1910, when the case is decided on appeal by the Missouri Court of Appeals it takes a written opinion of six printed pages (double column). Not to declare final judgment—oh, no! but to reverse the decision below and send it back for another trial. And the major part of the opinion is taken up with discussing in a most learned style the difference between an action on contract and in tort—the form of the action, not the merits of the case at all. And after nearly two and a half years the plaintiff is just where she was, so far as obtaining justice is concerned, when in May, 1908, she sat in the carriage and had her unpleasant experience with the rude driver.

The case must be tried over again with the certainty of another appeal and a good chance of another reversal. Is it not strange that among our people any one can be found brave enough to go to law. Sixteen men, a trial judge, twelve jurymen, and three appellate judges have all given their time to the woman's case, and it is all to do over again. And the trouble is that it is not the fault of the sixteen, it is the fault of the "system."

That such a system should continue to be borne by the people of the United States, is really the wonder of the age. It exists nowhere else in the civilized world. It is unknown on the continent of Europe. In England, where we found it less than two centuries ago it has been unknown for over half a century. Had the plaintiff in the case been in England instead of Missouri she would have gone to the county judge, the week after the occurrence, and having summoned the defendant to appear, would have told her story. A jury of five men might have been called, but probably the judge would have heard the case himself. No formal

⁷ Trout v. Watkins Livery Co., 130 S. W. 136.

pleadings would have been required. The judgment either for or against her would have been pronounced the same day and that would have been the end of it. No appeals on questions of form; no long opinions on bygone technicalities. At the jubilee of Queen Victoria, the bar of England was able to say as a tribute to law reform during her sixty years' reign: "Justice today is cheap and expeditious, and is done in our courts—no honest litigant can be defeated by any technicality or accidental slip." And yet we live in Missouri under a State Constitution which declares that the courts shall afford a certain remedy for every injury and that right and justice shall be administered without delay.

LET WELL ENOUGH ALONE.—There is an old adage to the effect that it is a good thing to let well enough alone or, as it is sometimes put in the form of a warning, "Let sleeping dogs lie."

In a recent criminal case in England a similar mistake was made. One Jackson was indicted for stealing electric lamps from a house. The case for the Crown disclosed nothing which amounted to legal evidence against him, but neither he nor the judge took that objection. Witnesses were then called for the defence, and in cross-examination they made admissions which showed that the accused had been in possession of electric lamps for which he could not satisfactorily account. This fact, when added to the evidence for the prosecution, was sufficient to warrant a conviction, and Jackson was convicted. On appeal the Court of Criminal Appeal sustained the conviction, holding that although the judge might have stopped the case on the conclusion of the evidence for the prosecution, yet, since he had not done so and the evidence brought in by the defence had supplied the legal proof previously lacking, the conviction must be sustained.*

Two cases decided during the past summer in our own courts teach the same lesson. An old lady struck by a street car in New Orleans suffered a fracture of the rib and of the right hand and contusions about the body and limbs. The shock affected her nervous system and heart, and she was confined to bed for two or three months, and it was four months before she could go out, even for a carriage ride, and the fracture of the rib superinduced pneumonia. She had permanently lost the use of one hand, and was unable to go about at the time of the trial without the use of a stick. The actual expenses in doctor's fees, nurses, drugs, etc., amounted to \$1,799.69. The jury allowed her \$1,000.00. It would be hard to say how they arrived at that kind of a verdict. But, at any rate, the defendant was not satisfied to let well enough alone and appealed to the Supreme Court, which affirmed the

* Jackson's Case, 5 Crim. App. Cas. 22.

judgment against it and increased the amount to \$4,799.69—\$3,000.00 for the injury and the balance for the expenses.⁹ In the other case the eleven-year-old son of the plaintiff was killed by the defendant's automobile, the jury gave the plaintiff \$1,500, and the defendant, not being content, the Supreme Court on appeal made it \$3,000.¹⁰

PROPER USE OF BAILED CHATTEL.—The use of a bailed chattel is very strictly confined by the courts to the object for which the bailment is made. A hirer must confine himself to the use contemplated in the hiring, and if the thing be used by him in a different way, it is a breach of the contract, rendering him liable absolutely.¹¹ But as said by a writer on the subject, "the leaven of common sense which keeps our law in constant ferment is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor, or he misses his way. Such instances are matters of everyday occurrence."¹² One who hires may be presumed to have much latitude as to time and methods of enjoyment; and local usage and the good sense of the contract should interpret favorably, where restrictive use was not clearly specified. If the hiring be general, any prudent use of the thing is permissible; and even if it be particular, terms not fairly meant for exclusion need not warp the hirer's discretion. In a late Alabama case, the defendants hired from the plaintiff two teams of horses and drivers therefor, to haul heavy iron castings, in which business defendants also had teams of their own. One of defendants' wagons got into a hole where the street paving had been torn up, whereupon one of plaintiff's drivers who had just had a similar experience at the same place unhitched his team and took it back to help defendants' team, and, because his team would not work in the lead, hitched it to the wagon with defendants' team in the lead, and in the effort to extricate the wagon a casting fell on one of plaintiff's horses and killed it. This use of the bailed horses was held not a breach of the contract of hiring so as to make the defendants liable for the value of the horse.¹³

⁹ *Hanna v. N. O. R. Co.*, 52 South. 855, La.

¹⁰ *Burnant v. Wolfe*, 52 South. 1025, La.

¹¹ *Laws. Bail. Sec. 21.*

¹² *Schoul. Bail. Secs. 140, 141.*

¹³ *Weller v. Camp*, 52 South. 929.

DANGEROUS PREMISES—INVITATION TO FIREMAN.—In *Lunt v. Post Printing Co.*,¹⁴ the defendants were a printing company, and an acid carboy having accidentally broken in one of the rooms of its building, a rush of fumes from the room resembling smoke caused one of the employees to think that the building was on fire and to turn on the fire alarm. The fire department at once responded and a fireman who first reached the room where the fire was supposed to be was overcome and suffocated. As a matter of fact there was no fire at all. The Supreme Court of Colorado rules that the defendant by turning on the alarm did not invite deceased on its premises, but that he came there in the performance of his public duty as a fireman, under the rule that firemen who enter a building in response to a fire alarm are licensees merely, and the owner or occupant is not liable for their injury by reason of any defects in the premises.

LEGISLATIVE DELEGATION OF POWER TO MAKE RULES TO PUBLIC SERVICE CORPORATION.—The Supreme Court of Alabama decides that an act of the Legislature, authorizing street railroad companies to make reasonable rules regarding transfers, and making it unlawful to fraudulently or willfully violate such rules, is not unconstitutional as delegating to street railroad officials not only the right to legislate, but to suspend the law by a suspension or abolition of the rules; the right to make reasonable rules existing independently of the act, and the authority thereby given not being the delegation of authority to legislate, but merely reiterating the right to make such rules. Three of the seven judges dissent. Mayfield, J., regards the act as nothing more nor less than an attempt, on the part of the legislature, to authorize any and all persons in this state who operate a street railroad, or the president or managing officer of a corporation which operates such a street railroad, to make and unmake the criminal laws of the state pertaining to the issue, use, or disposition of transfers used in connection with street railroads.

"If these favored persons authorized to make the laws on this subject make no rules or regulations thereon, then there can be no crime under this act. If they make rules on this subject there will be just that many laws, and no more, under this act; if they make rules on the subject to-day, there are that many laws on the subject to-day; if they repeal or abolish all these rules to-morrow there will be no laws on the subject, until they make some more rules and regulations. If two or more of these persons make different and inconsistent rules, no matter how inconsistent, they are all law. The criminal law on the subject of transfers may and will be one thing to-day and another to-morrow; one thing in one town or city, and another in other towns or cities. A given act will be a crime in Montgomery, and not in Birmingham; it will be a crime on one street car in Montgomery, and not on another; it will be a crime on one car, and not on another of the same train."

¹⁴ 110 Pac. 203, Colo.

And if the law is valid, say the dissenting judges, how can this court or any citizen desiring to observe or enforce the criminal law relating to these transfers, know or find it? Only by interrogating every person who by this act is authorized to make the law. And, if you could reach all, while you were interrogating one, the others might be making other laws or repealing those then existing. The act should be declared unconstitutional, because it is an unwarranted delegation of legislative power to individuals: and because it is an attempt to authorize individuals to suspend the laws at pleasure.¹⁵

THE DIFFERENCE BETWEEN LOAN AND EXCHANGE.—In an Alabama liquor prosecution it was charged that the defendant “did sell, barter or exchange” a quart of whisky contrary to the statute. He tried to evade the charge by pleading, and in this the party who received it confirmed him, that he had lent the liquor to the latter who was to return the same amount to him at a future day. His counsel argued that this was a loan and that the word loan was not used in the statute. The court admitted that if the transaction was a “loan” the defendant was not guilty, but ruled that it was not.¹⁶ A sale is a transfer of the title to personal property for a price in money. A “barter” is a transfer of property for something which passes for money at the time or place, but which is not money—as, for instance, tobacco or skins of animals which have sometimes taken the place of money under extraordinary circumstances. An “exchange” is the transfer of one piece of property for another piece instead of for money paid or promised, while a “loan” is the temporary delivery of a chattel to be used by the other without paying for the use and to be returned to the owner on demand or when the use is accomplished. Here the receiver did not intend to return the same whisky, but only the same quantity of other whisky, it could not be a “loan” but was an “exchange.” The civil law recognized a bailment of this character as a loan for consumption which it called a *mutuum*, but both Lord Holt, in *Coggs v. Bernard*, and Sir William Jones, in his *Essay on Bailments*, while adopting the other civil law bailments, rejected this one as not applicable to the principles of the common law.¹⁷

CARRIAGE OF LIVE ANIMALS—DEFECTIVE CRATING.—The right of a common carrier to inspect proffered shipments and to refuse such as are not properly packed is well settled. But that it is

¹⁵ *Whaley v. State*, 52 South. 941, Ala.

¹⁶ *Clark v. State*, 52 South. 894.

¹⁷ *Laws Bail*, Sec. 8.

the duty of the carrier to refuse to accept goods which ordinary observation would discover to be in an unfit and unsafe condition for transportation is affirmed in a recent case in Alabama,¹⁸ with the result that on the carrier and not the shipper will fall the responsibility for a loss caused by such unsafe packing or condition. The plaintiff sued for the value of a dog which he had delivered to a railroad but which had escaped en route from the crate in which it was confined. The railroad set up as a defense that the crate was insufficient for the purpose and that the loss was therefore due to the negligence of the shipper. But the Supreme Court holds that the carrier has the right to inspect proffered shipments and to refuse their acceptance when not in fit condition for transportation; that, if unfit for shipment, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may, if he can, conform the shipment to a fit condition for transportation; and, that the acceptance of a shipment for transportation, without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

NON-ACTIONABLE CONSPIRACY.—A curious case of non-actionable conspiracy appears in the Minnesota Supreme Court.¹⁹ The plaintiff was the owner of some real estate in a city, the rear of which abutted upon a public alley; and on which he had erected a large tenement building sufficient for occupancy by several families. Defendants were the owners of property in the vicinity of his and abutting upon the same alley. He complained that, subsequent to the erection of his tenement house, the defendants, together with one Walker, a member of the City Council, conspired to injure him by petitioning the council to vacate the alley, as it was of no value and would cost a good sum to grade and fill it, and that they were a majority of the property owners concerned. The plaintiff charged that they knew their statements to be false and that they made them to injure him. In holding that no action would lie, the court says:

"If the result to be obtained be lawful, and lawful means be adopted for its accomplishment, it is immaterial what motive prompted those engaged therein, and no action lies against them. The end sought by the defendants, the vacation of the alley, was lawful, and they applied to the proper tribunal for relief. But it is contended that the means employed by defendants were unlawful. In this respect the complaint alleges that defendants falsely and maliciously stated in the petition that the alley was of no value, that it would entail an expense of several thousand dollars upon the city to grade it, and that the petitioners constituted a

¹⁸ *Atlantic Coast Line v. Rice*, 52 South. 918.

¹⁹ *Boas v. Walker*, 127 N. W. 467.

majority of the property owners who would be affected by the vacation. It further alleges that these statements and representations were false and untrue, and so known to be by defendants. These allegations do not bring the case within the rule. The charge that defendants falsely represented that they constituted a majority of the property owners is not sustained by the record. The petition for the vacation of the alley was made a part of the complaint, and no such representation appears therein, and it was not claimed that the particular representation was otherwise made than in the petition. The other statements in the petition, to the effect that the alley was of no value and that the grading thereof would involve the city in considerable expense, are expressions of opinion, and not assertions of existing facts which would naturally tend to mislead or deceive the city council, and are not, therefore, within the meaning of the law, unlawful. The rule applicable to cheating and false pretenses is analogous, and controls this particular branch of the case. It is held in cases involving representations of that kind that opinions as to value are not wrongful or unlawful, and create no offense against the person who expresses the same."

THE CARE REQUIRED OF DRUGGISTS.—In a recent Maine case, where a man had presented a prescription to a druggist calling for some chlorodyne tablets, a non-poisonous medicine, and the druggist had given him corrosive sublimate tablets containing bichloride of mercury and muriate of ammonia—one grain of which would cause death—from the effect of the taking of which the patient nearly died, the Supreme Court lays it down that the ordinary care required of a druggist in compounding medicines and filling prescriptions requires a degree of vigilance and prudence commensurate with the dangers involved, and the highest practicable degree of prudence, thoughtfulness, vigilance, and the most exact and reliable safeguards consistent with reasonable conduct of the business that human life may not be exposed to the danger resulting from substitution of deadly poisons for harmless medicine. The Supreme Court affirms a judgment for damages against the druggist, in spite of the argument of his counsel that for a druggist to mistake a large white tablet stamped with the word "poison" for a small dark green one, was not negligence.²⁰

REGULATION OF NEWSPAPERS.—The constitutionality of a Pennsylvania statute of 1907 requiring all newspapers to print in a conspicuous place, in every issue, the names of the owners, proprietors, or publishers and the managing editors, being contested by a weekly newspaper in that state, has been affirmed by the Supreme Court as a valid exercise of the police power.²¹ The court rules that if the newspaper is a partnership, the names of the partners should be given, if a limited partnership, the names of the partners, officers and managers, and, if a corporation, the names of the president, treasurer, and secretary.

²⁰ Tremblay v. Kimball, 77 Atl. 405.

²¹ Com. v. Short, 77 A. 449.

THE LIEN OF A BAILEE.—The common law lien of a bailee arose wherever the bailee had by his labor or skill imparted an additional value to the property, and hence one doing work upon a thing had a lien and so had a carrier who is presumed to have added to its value by taking it to where it is wanted. But one who merely kept the goods for hire had no lien, though by statute in many states, a warehouseman is given the right.²² In a New York case,²³ a lathe had been stored with the defendant for the mutual benefit of both parties. After a time he notified the owner to take it away, which he did not do, and when four months later, the owner demanded it the other refused to deliver it until he paid him a reasonable storage charge. The court held that he was entitled to be paid for the storage but not to hold the goods; that no lien arises in favor of a casual bailee and that the case was not within the statute giving a lien to a warehouseman for the latter is a person engaged in the business of storing goods which the defendant was not.

THE ASSIGNMENT OF A LIABILITY.—In a recent case in New Jersey, a resident of France had made a contract with one Victor E. Freeman, of New Jersey, to purchase a large number of staves to be manufactured and delivered by said Freeman. Subsequently a manufacturing corporation was formed to which Freeman assigned his contract, but the Frenchman refused to recognize the assignment, and the Court of Appeals rules that the contract was not assignable.²⁴

Though modern law favors the freedom of the assignment of rights, the contrary is true as to liabilities, and one can rarely be compelled to accept performance of a promise from one who was not a party to it.²⁵ As said by an English judge, "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract," or as Pollock puts it, the intention of a contracting party is to create an obligation between himself and another certain person, and, if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else.²⁶

In an earlier New Jersey case an assignment by a New Jersey corporation to an Arizona corporation of a contract to publish school books was held ineffectual.²⁷ Of course, where the contract involves no question of skill or personal confidence (which

²² Laws Bail. Sec. 27.

²³ *Alton v. N. Y. Taxicab Co.*, 121 N. Y. Supp. 271.

²⁴ *Schlessinger v. Forest Products Co.*, 76 Atl. 1028, N. J.

²⁵ Laws Contr. Sec. 358.

²⁶ Contr. 467.

²⁷ *Wooster v. Crane Co.*, 73 N. J. (Eq.) 22; 66 A. 1093.

was clearly present in the principal case) there is no objection to the promisor delegating its performance to others, he remaining liable for the work being properly done, but as said in that case, "the injustice of permitting an assignment of a contract for personal services, for the painting of a picture, for a partnership, is obvious. A contract for the sale of goods to be manufactured stands on similar grounds where the vendee relies upon the skill and experience of the manufacturer as well as upon the implied warranty of quality. No man who has employed a tailor to make a suit of clothes ought to be compelled to accept a suit made by the tailor's assignee."

MANSLAUGHTER—INEXCUSABLE HOMICIDE.—What was intended as a practical joke was followed, as it often is, by very serious consequences in a recent case in Kansas. A band concert was in progress on a temporary stand erected in one of the streets of Arkansas City, where defendant was employed as a member of the fire department. A large crowd of people having gathered in the street to listen to the music, the fire chief, who was intoxicated and had been off duty all day, concluded it would be fine sport to turn on a false alarm and scatter the crowd by driving rapidly through it for the supposed purpose of reaching the fire. After communicating his ideas to the prisoner the two proceeded to carry them out. The chief turned on a fake alarm, his confederate hitched up the chief's horse, and they started down the street toward the crowd as fast as they could get the horse to run, the prisoner driving and the chief whipping the horse. Their vehicle struck a buggy, which overturned, injuring one of the occupants so seriously as to cause her death. The Kansas statutes make homicide excusable when committed by accident or misfortune, or in doing any other lawful act by lawful means with usual and ordinary caution and without unlawful intent. The Supreme Court of Kansas, in affirming the prisoner's conviction of manslaughter, holds that the intent governs, and that, as the injury was the result of reckless, wanton, and uncalled for acts, the intent was unlawful, and the homicide inexcusable.²⁸ What was done with the chief, who seems to have been even more guilty, the report does not say.

THE RIGHT TO CHANGE ONE'S NAME.—In a suit on a life insurance policy in New York the defense was that the assured had declared in his application that his name was "Maurice W. Mansfield," which the company said was untrue, in that his father's name was Maynard. The proof showed that this was so and that until 1892, when he was a little over age, he had been

²⁸ State v. Brecount, 107 Pac. 763.

called Myron W. Mansfield, but that about that time he changed his name to "Maurice W. Mansfield" and had been known by that ever since. The trial court told the jury that if that were so, this was his name at the time of his death, and on appeal the ruling is affirmed by the Court of Appeals.²⁰ A very interesting judgment is that of Vann, J., who goes into the origin and history of names:

"While," he says, "the legal name of a person now consists of a given name, or one given by his parents, and a surname, or one descending from them, history shows that this is not always the case. In the early life of all races surnames were unknown, while given names have been used from the most distant times to identify and distinguish a particular individual from his fellows. In England surnames were unknown until about the tenth century and they did not come into general use or become hereditary until many years later. At first they were used, sometimes for an easy method of identification and at others from accident, caprice, taste and a multitude of other causes. Mr. Bardsley in his *History of English Surnames* gives thousands of instances of change through selection, the action of neighbors in applying descriptive epithets, the use of nicknames and pet names and the gradual development through circumstances and the necessity of identification as population increased. Thus the son of John or Peter became known as John's son or Peter's son, and finally as Johnson or Peterson, aside from his given name. It is well known that the word meaning 'son' in different languages, such as *Fitz* and *Mac* was prefixed to the Christian name of the father to give the son a surname and 'O' to give one to the grandson, and thus we have the names *Fitz-Gerald*, *MacDonough*, *O'Brien*, and many others. The place of birth or residence, the name of an estate, the business pursued, physical characteristics, mental or moral qualities and the like, were turned into surnames. It is to be noted, however, that the surname in its origin was not as a rule inherited from the father, but either adopted by the son or bestowed upon him by the people of the community where he lived. Father and son did not always have the same surname, and it was not regarded as important, for both frequently had more than one. Coke wrote in the forepart of the seventeenth century: 'Special heed is to be taken of the name of baptism as a man cannot have two, though he may have divers surnames.' . . . Camden mentions a man with eight sons each with a different surname and not one with that of his father. In a scholarly opinion by Chief Judge Daly, to which we are much indebted, many instances are mentioned where the color of the individual, as *White*, *Black* or *Brown*, his height or strength, as *Little*, *Long*, *Hardy* or *Strong*, mental or moral attributes, as *Good*, *Wiley*, *Gay*, *Moody* or *Wise*, fixed the surname."

The judge gives a number of instances, ancient and modern, of the change of name by persons of fame. Melancthon's family name was *Schwartzerde*, meaning black earth, but as soon as his literary talents developed and he began to forecast his future he changed it to the classical synonym by which he is known to history. Rembrandt's father had the surname *Gerretz*, but the son, when his tastes broadened and his hand gained in cunning, changed it to *Van Ryn* on account of its greater dignity. A predecessor of *Honore de Balzac* was born a *Guez*, which means

²⁰ *Smith v. U. S. Casualty Co.*, 90 N. E. Rep. 947.

beggar, and he grew to manhood under that surname. When he became conscious of his powers as a writer he did not wish his works to be published under that humble name, so he selected the surname Balzac from an estate that he owned.

Voltaire, Moliere, Dante, Petrarch, Richelieu, Loyola, Erasmus and Linnæus were assumed names. Napoleon Bonaparte changed his name after amazing victories had lured him toward a crown, and he wanted a grander name to aid his daring aspirations. The Duke of Wellington was not by blood a Wellesley, but a Colley, his grandfather, Richard Colley, having assumed the name of a relative named Wesley, which was afterwards changed to Wellesley. General Grant's baptismal name was Hiram Ulysses—he changed it to Ulysses Simpson. President Cleveland's name was Stephen G. He changed it to Grover. And the judge cites the following paragraph from Walsh's *Handbook of Literary Curiosities*:

"Authors and actors know the value of a mouth-filling name. Herbert Lythe becomes famous as Maurice Barrymore. Bridget O'Toole charms an audience as Rosa d'Erina. John H. Broadribb becomes Henry Irving. Samuel C. Clemens and Charles R. Browne attract attention under the eccentric masks of Mark Twain and Artemus Ward. John Rowlands would never have become a great explorer unless he had first changed his name to Henry M. Stanley. James B. Matthews and James B. Taylor might have remained lost among the mass of magazine contributors but for their cunning in dropping the James and standing forth as Brander Matthews and Bayard Taylor. Would Jacob W. Reid have succeeded as well as Whitelaw Reid?"

An English writer³⁰ says that the law of most countries seems to have been little disturbed by any details as to the names which individuals bear, how they come to acquire and use them, and when they may change them. Human nature seems disposed to sit easily under the routine which habit engenders, parents bestowing and children taking and adopting their names without question of complaint, as naturally as the rain falls or the sun shines. The importance and necessity of a name are most conspicuously shown in conveyances of property, in registers of marriage, in bequests, in wills, and in legal procedure: and when a mistake occurs in description serious difficulties arise, which are usually only overcome by an expensive array of evidence to vindicate the identity of person. The statutes prescribing how one may change his name through a judicial proceeding, by an application to a court, do not mean that it requires statutory authority to change one's name but only that, by doing it in this way, the date of the change may be accurately proved, and the fact of the change be afterwards indisputable. The safety and security of all persons are obviously much enhanced by keeping and adhering to one distinctive name, and though it is no presumption

³⁰ Patterson, *Liberty of the Subject*, vol. 1, p. 428.

of law, that a change of name is *prima facie* evidence of fraud, yet such a step almost always requires some explanation, and it is one of the artifices often resorted to for the concealment as well as the perpetration of crime. But the law has not found it necessary to declare it to be a penal offence to change one's name, nor is any liability whatever incurred for the mere change, though there necessarily results some inconvenience in any sudden operation of that kind.

There is, says Paterson,³¹ no ceremony or legal act required in order to effect a change of name, except only the declaration of a settled purpose and the adoption of some means of making it known. Any mode of telling one's neighbors and the public that a new name has been and is intended to be adopted and recognized is sufficient to constitute a change of name, and no deed need be executed, and no royal license or act of parliament need be obtained for this purpose. These are only, as just pointed out, another means of publicity, and nothing more. Lord Eldon said the King's license is nothing more than permission to take the name, but does not give it; and that a man taking such new name may take a legacy if left to him under the old name. And Tindall, C. J., said the royal sign manual is a mode which persons often have recourse to, because it gives a greater sanction to it, and keeps it more notorious; but a man may, if he pleases, and if it is not for any fraudulent purpose, take a name, and work his way in the world with his new name as well as he can. And Lord Tenterden said that a name assumed by the voluntary act of a man, adopted by all who knew him, and by which he is constantly called, becomes for all purposes as much and effectually his name, as if he had obtained an act of parliament to confer it upon him. The general use and habit is everything, when the true name of a person at a particular time is required.

THE NATIONAL PURE FOOD LAW.—The Federal Court reported cases are beginning to show the effect of our National Pure Food Law, and the need there was for it. The reason for national legislation is briefly summed up by McPherson, J., in a case in Iowa:³²

"Several of the states within the past few years have enacted pure food statutes. Congress, June 30, 1906, enacted the statute in question. All these statutes were enacted to cure evils well-nigh intolerable that had grown up during this age of greed and avarice and commercialism that has made money getting the prime object of life with so many. The evils were such that much of the foods we ate, whether meats of any kind, including fish and poultry, or fruits in all forms, and bread-stuffs, were so adulterated and 'loaded' or 'doctored' as to deceive the consumer. And the same was true of flavors and condiments. The evil

³¹ Liberty of the Subject, *ante*.

³² *Shawnee Milling Co. v. Temple*, 179 Fed. 517.

as to confectionery and extracts was as great. Still greater was the evil as to drugs and medicines. In fact, the evils were everywhere present, as to food and medicine, and other things. And to eliminate some of these evils, and to enable the purchasers to receive what they ordered and paid for, many states passed statutes aimed at those frauds. But it was soon found that the states in some instances were disposed to condone as to some articles of local manufacture, and in many other instances the states were powerless to work out a remedy. Thereupon Congress, acting upon the theory that the evil was of national concern, enacted the statute in question. The debates in Congress show that the measure was earnestly fought as being one of paternalism, and a police regulation with which the states only could act."

In this case the plaintiff, a milling company, contested in the Federal Circuit Court the right of Congress to legislate on the subject, but without success. The Court pointed out the various topics in which Congress had acted under the wide authority to regulate commerce between the states. In addition to the Federal law prohibiting the carriage of lottery tickets from state to state, Congress

"has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs. Congress has enacted the live stock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of live stock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted a second employers' liability act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute above referred to. Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c. o. d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package. These statutes, police regulations in many respects, are alike in principle to the act of June 30, 1906, under consideration. Can it be possible they are all void?"

The need of such a law is shown in another opinion by the same judge, sitting in a Federal court, in Missouri.³³ The claimants whose property had been seized under the Pure Food Law operated a canning factory in Benton Harbor, Mich., where fruits grown in Michigan, as well as in other states, were canned and prepared for sale. They canned certain "tepee" apples and blackberries grown in Arkansas, sold under a label on which was printed: "Tepee Apples (or Blackberries, as the case might be). Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan." The evidence was that Michigan apples and blackberries were better than those grown in Arkansas. It was held that the labels indicated that the fruit was grown in Michigan.

³³ U. S. v. 100 Cases of Apples, 179 Fed. 985.

and that the claimants were guilty of misbranding, in violation of the act. McPherson, J., said:

"Adulteration of goods and false labeling had become so common that it was well-nigh impossible to purchase pure goods or that which was called for. The same was true as to medicines. Congress undertook to remedy it. The one purpose was to prevent the sale of adulterations. The other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

"In this case the label is very attractive to the eye, and of course its only purpose is to sell the fruit. But for that the label would not be on the can. That is what the purchaser at retail looks for, and that is what, more than any other statement or argument, induces the purchase. The evidence shows that to be misleading, because the words thereon, 'Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.,' is understood by all adults and children as not only being there packed, but fruits grown in that vicinity. Of course, it is idle to insist, as Mr. Godfrey does, that the fruits could not have been raised within the City of Benton Harbor. . . . There can be no doubt, as it seems to me, that any purchaser from this label would be deceived, in that he would be receiving Arkansas fruits instead of Michigan fruits. Deception is seldom practiced by a literal falsehood, but is usually joined with some truth, so that the entire statement will deceive. And so in this case. Of course the statement is true that Godfrey & Son reside and do business at Benton Harbor; but that one true statement is used in conjunction with the packing of the fruits, and I repeat that I would believe from that, as would all others, that it is Michigan fruit within the cans. And if Godfrey & Son believe, and if it be true, that Arkansas fruits are as good or better than Michigan fruits, let that fact be disclosed by labels and otherwise. This statute is to protect consumers, and not producers. It is a most beneficent and righteous statute, and within the powers of Congress to legislate concerning, and should be enforced. It cannot be enforced if it is to be emasculated, as is sought in the present case. The order will be that the fruits and cans under seizure will be sold by the marshal after being properly branded. This will be done, instead of destroying them, as the fruits are not deleterious."

LIABILITY OF SELLER OF POISONOUS ARTICLES.—It seems that the time was fully ripe for a National Pure Food and Drug Law if one can judge of the necessity by the numerous cases in the current reports where actions are brought for injuries caused by the negligent putting on the market by manufacturers and traders of deleterious substances. One of the latest is *Darks v. Scudder-Gale Grocer Co.*,³⁴ in the Missouri Court of Appeals. The grocery company had sold to a retail firm in another state a dozen

³⁴ 130 S. E. 430.

bottles of extract of ginger, which their agent said was used for medicinal purposes, and was quite harmless. One of the partners being slightly indisposed and feeling the need of medicine, mixed the ginger with water and drank a moderate quantity, and as a result thereof died. It turned out that the ginger was prepared of wood alcohol, and was a deadly poison. The preparation was not manufactured by the grocery company but by one Shelley, a manufacturing chemist, doing business under the name of the Shelley Manufacturing Co., but on the invoice of the goods shipped and sent to the deceased was the following: "All goods bearing our Buffalo Brand are guaranteed." On the bottles containing the ginger extract was a label as follows: "Buffalo Brand Pure Ginger. Scudder-Gale Grocer Co., St. Louis," and in addition the head of a buffalo was printed on each bottle. The court, in a very interesting opinion, holds the grocery company liable; and, of course, in accordance with the well-known case of *Thomas v. Winchester*,³⁵ the chemical company would be liable also.³⁶

THE MODERN AND THE ANCIENT HIGHWAYMAN—METHODS HAVE CHANGED BUT LAW HAS NOT.—The evidence in the case of *Warshow v. Elwood Sons*,³⁷ a recent Connecticut case, is as interesting as a modern novel. Max Warshow had been a dealer in wallpaper and painters' supplies in Stamford, and Elwood Sons were auctioneers in Bridgeport. Two other characters in the comedy of errors were one Anderson, an insurance and real estate agent, and one Busey, a painter. At the suggestion of Max Warshow, they made an agreement to buy paints and painters' supplies of a poor quality, mark them with the labels of reputable manufacturers, and with labels indicating they were of superior quality, and advertise them as bankrupt stock. Part of the means to be employed to cheat the public was to mix some good stock with the poor, and another ruse was to take some of the stock from Bridgeport to Hartford, sell all they could there and then when they could sell no more have a Bridgeport sheriff go to Hartford, seize it, and bring it back to be sold as bankrupt stock. All the parties were to contribute equally in cash to the partnership, but all of them failed to do so; and in the end the business turning out not to be as profitable as it was expected, Max Warshow, who seems to have been the most active in the business, found himself saddled with a considerable debt. He thereupon filed a bill asking that a receiver be appointed to take charge of the business, for an accounting, and that the other parties should be required to contribute their share to the payment

³⁵ 6 N. Y. 397.

³⁶ For a review of the cases holding the original manufacturer liable to

third parties, see 44 Am. Law Rev. 272.

³⁷ 76 Atl. 531.

of debts and losses. But the trial court (whose decision was affirmed on appeal) figuratively kicked the plaintiff out of court, telling him that he had violated conscience and good faith in his conduct in the matter; that he did not come into court with clean hands; that he had acted in bad faith, both with his associates and with the public, who were or might be affected by the consequences of this scheme, which was corrupt in its origin and corrupting in its tendencies, and it refused to interfere in the matter at all or to give him any remedy.

The highwayman of old held up the public by the aid of a good horse, a mask and a couple of pistols; the modern highwayman holds up the public to-day with the aid of gilt signs, lying advertisements and false labels. The old freebooter rarely ventured into court, for if he did and was discovered it was all over with him. A long time ago a bill in equity was filed in the English chancery which stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into a partnership, and it was agreed that they should equally provide all sorts of necessities, such as horses, saddles, bridles, and equally bear all expenses on the roads and at the inns, taverns, ale-houses, markets and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the County of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., Bagshot, Salisbury, Hampstead, and elsewhere to the amount of 2,000 pounds and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill was dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined fifty pounds apiece. The plaintiff and the defendant were both hanged, and one of the solicitors for the plaintiff was afterwards transported.

The Connecticut highwayman suffered only the inconvenience of losing his case, and no modern court, in the United States at least, ever presumes to interfere with a highwayman's lawyers.

LIVERY STABLEKEEPER NOT A COMMON CARRIER.—In a recent Missouri case the rights and liabilities of livery stablekeepers are discussed at length.³⁸ The court holds that they are not common carriers, as they do not hold themselves out to serve any and all persons, but operate only under a special contract, and deal with such persons only as they choose; that therefore they are not under the obligation to use the high degree of care towards persons they have in charge that the common carrier is required to use towards his passengers. This case, for other reasons, will be found³⁹ among those which we print this month illustrative of the Law's Delay.

WHAT ARE "TOYS."—"Toys," says the Federal Court in a recent revenue case, are playthings for the amusement of children.⁴⁰ Therefore imitation roses of celluloid and metal, which are worn as boutonnieres, chiefly by children on occasions of frolic and fun, are sold by toy dealers and used as gifts in prize packages, are not "toys" within the meaning of the Tariff Act, but are "artificial flowers" under another section of the act.

RAILROAD THUGS AND PASSENGERS' PERILS.—The railroad corporations of the country are constantly heard to complain that they very rarely receive fair treatment or justice at the hands of juries. The answer is that they are largely to blame themselves for this condition of things; that their constant disregard of the rights of shippers and of the traveling public has caused this deep-seated prejudice. What can a railroad expect which not only justifies and defends but retains in his place a brakeman like the one whose forbidding personality is revealed in the record in *Cathey v. St. Louis, etc., R. Co.*,⁴¹ decided by the Court of Appeals of Missouri last summer. On a morning in October the plaintiff who had purchased a ticket and put it in his pocketbook found on reaching the platform that there was quite a crowd boarding the train so that before he could reach the car steps it had begun to move. As the plaintiff got on the lower step with his hand on the side rail the brakeman, who was on the upper step, demanded his ticket in these polite and (to passengers on some railroads) familiar terms: "You God damn son of a bitch, you can't ride on this train without showing your ticket," at the same time emphasizing his request by kicking him in the mouth, knocking him from the moving train to the platform, where he was picked up stunned and bleeding and with his teeth broken and

³⁸ *Trout v. Watkins Livery Co.*, 130 S. W. 136.

³⁹ *Ante*, p. 106.

⁴⁰ *Hamburger v. U. S.*, 180 Fed. 632.

⁴¹ 130 S. W. 131, Mo.

loose. When the brakeman asked him for his ticket he told him he had it in his pocket and would show it as soon as he got in the car, that he was a cripple and could not hold on to the rail and get out his pocketbook. There was no conflict as to the facts, for here is the testimony of the gentle brakeman: "I did not kick him any harder than I intended to; intended to kick him just as hard as I did; kicked him with my right foot; I belted him just as hard as I could. I was 26 years old at that time and weighed 173 pounds, and was an ordinarily stout man. Didn't notice that the plaintiff only had one foot at the time; I paid no attention to that; it wouldn't have made any difference." The jury gave the plaintiff \$50 actual and \$450 exemplary damages. Here is a case where one would think that the railroad got off easily, and it is rather interesting to know that in Pemiscot County, Missouri, the destruction of a man's teeth by a kick given by an infuriated brute is valued at fifty dollars. But the railroad was not satisfied, it sought to convince the Appellate Court that because it had a rule that passengers must show their tickets before entering the cars, the plaintiff had no cause of action at all, and next it argued that the damages were too large! Further comment is unnecessary.

RESTRAINT ON MARRIAGE IN WILLS.—Mr. Justice Lamm, of the Supreme Court of Missouri, in deciding in a late case that a condition subsequent in a will in total restraint of marriage is void as against public policy, has this say in regard to the well-settled exception to the rule in the case of widows:

"There is only one main qualification to the rule against total restraint of marriage, and that is an exception touching widows. It seems settled law that men have a sort of mournful property right, so to speak, in the viduity of their wives, and that a grant or devise to them may be defeated by the violation of a condition subsequent providing for the grant or devise becoming inoperative or reverting in case of remarriage. The exception has been put on sundry grounds, and courts have not always been able to find common reasons to sustain it. But it has been long established and is almost universally followed. It is a curiosity in the law that when the boot is on the other foot and a wife makes a grant, which by condition subsequent is to be defeated on the remarriage of her husband, the general doctrine that conditions in restraint of marriage are void as *contra bonos mores* has been applied with vigor (see, for example, *Waters v. Tazewell*, 9 Md. 291), though the English rule seems to be the other way (2 Jarman on Wills [6th Ed.] 886), and there are later decisions following the English rule (2 Pom. Eq. 933). Solid grounds for any distinction between husband and wife in this regard is hard to make out. It was once tartly, but shrewdly, remarked by a pundit of the bar that the distinction now up may have its root in the fact that men both make and construe the law, and women stand voiceless in that behalf. Whether this be so or not may be left to the decision

of some case involving the point. We need not meddle with it, for no exception or incongruity militates against the general rule."⁴²

NO DUTY TO DENY NEWSPAPER REPORTS.—One does not enter into contractual relations with another because he keeps silent and does not reject an offer made to him. "If you don't write me by return mail that you do not want my horse at the price stated I will consider him yours," does not make a contract binding on the offeree because he makes no reply.⁴³ In a recent Missouri case it was attempted to go even further than this and to hold a man liable for not denying a statement made in a newspaper that he had made a contract. The suit was on an alleged subscription by the defendant to the stock of the Louisiana Exposition Company, which the defendant denied. To prove its case the company introduced in evidence an article published in a newspaper in the town where defendant resided, in which it was stated that defendant's "subscription of \$2,500 to the World's Fair enterprise is probably the largest individual subscription outside the City of St. Louis." The Appellate Court properly decided that even though the defendant may have read the article he was not bound to deny its correctness nor is he estopped now to do the same thing.⁴⁴

INJURIES TO PERSONS ATTENDING SHOW.—In *King v. Ringling*,⁴⁵ an action was brought against the proprietors of a circus for injuries received by a spectator from the tent being blown down while he was watching the performance. The Court of Appeals of Missouri, in reversing a judgment for plaintiff, says that while persons engaged in the business of providing public amusements must observe care commensurate to the circumstances of the situation to protect their patrons against injury, yet tents, however well constructed and erected, are not as substantial as other structures for housing people, and, in voluntarily occupying the tent of defendants, plaintiff assumed all the natural and inherent risks pertaining to habitations of that character. On the other hand, in inviting the public to occupy their tents for their own profit, defendants bound themselves to exercise reasonable care to protect their invitees against injury from other than natural or accidental causes. The Court holds that it is not a case for the application of the rule of *res ipsa loquitur*, and the mere fact that the tent collapsed in a severe windstorm will not support an inference of negligence.

⁴² *Knost v. Knost*, 129 S. W. 129. *Emerson*, 129 S. W. 753, Mo.

⁴³ *Laws on Contr.*, Sec. 18.

⁴⁴ 130 S. W. 482.

⁴⁵ *Louisiana Purchase Ex. Co. v.*

A PROTECTION THAT DID NOT PROTECT—WATER COMPANIES.—An example of strained construction of a contract is found in a late case in Maine, where it is ruled by the Supreme Court that a water company agreeing with a city to furnish water for fire protection is not liable for municipal property burned through the company's failure to furnish an adequate supply. To argue that such a loss is not a natural result of the breach of such a contract and that it could not have been fairly within the meaning of the contract seems rather absurd. There is a good deal of dispute as to whether a property owner in the city whose house was destroyed by the failure of the water company to keep its promise could sue as one for whose benefit the contract had been entered into, but when it is one of the parties to the contract who seeks to enforce it, to deny a remedy and construe the contract to mean what no ordinary person would think for a moment that it meant, seems wrong.⁴⁶

THE AGENCY OF A TELEGRAPH COMPANY.—Is the telegraph company the agent of the sender so as to bind him to the receiver to the terms of a message which has been altered by the company? We have been accustomed, as a teacher and as a writer on the principles of the law to answer that question in the affirmative. But here comes the Supreme Court of Idaho, in an opinion of nearly twenty pages, and says that it is not.⁴⁷ And it seems to have much modern authority on its side, though the new view is hardly logical. If the postoffice is the agent of the offerer, as it is not disputed it is, why is not the telegraph company? To say that the telegraph company is not authorized to deliver an incorrect message, does not meet the question, for neither it nor the postoffice is authorized to delay the communication and yet if it does so the person using the agency is bound by its default as in the case of any other agent.

INJURIES TO CHILDREN—INVITATION.—It has been laid down in numerous cases that where dangerous machinery or things of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or playgrounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or thing is liable for such injury. The railroad turntable has furnished many applications of this doc-

⁴⁶ *Milford v. Bangor Co.*, 76 A. 696.

⁴⁷ *Strong v. Tel. Co.*, 109 Pac. 910.

trine. In a Washington case, the defendant maintained a covered exhaust barrel in connection with its shingle mill. The barrel was located at the edge of an old mill-pond, and, though accessible from a railroad track, was 48 feet east thereof, and guarded on three sides by debris. It was full of hot water from which steam or vapor constantly arose, and from which people residing in the neighborhood obtained water for domestic purposes. A child nine years old, started with her mother to the barrel for water; but, while her mother stopped to talk with a neighbor, she took the bucket to the barrel, and while in the act of dipping water therefrom a cedar plug fastened in the bung-hole came out, and hot water poured on her leg and injured it. The Supreme Court holds that the barrel was an appliance connected with an ordinary manufacturing plant, so surrounded with ordinary safeguards as to warrant the inference that immature children unattended would not approach it, and not an attractive nuisance, and hence defendant was not liable for the injury so sustained.⁴⁸

The Court says that if this barrel of water was inherently dangerous, so as to render the owners liable for accidents to children, then the barrel of rainwater, or the pond, or the cherry tree, or a fire on a vacant city lot near where children are accustomed to play, is an attractive nuisance, and if children are drowned or injured therein the owners of such lots are liable. And it quotes with approval the language of a Virginia judge:⁴⁹ "Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the mill-pond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? This rule would charge the duty of the protection of children upon every member of the community except their parents? A very onerous duty!"

⁴⁸ *Gordon v. Lumber Co.*, 109 Pac. 1044.

⁴⁹ *Ritz v. Wheeling*, 45 W. Va. 270; 31 S. E. 994.

NOTES OF RECENT DECISIONS.

CONTRACTS—ADVERTISEMENTS IN NEWSPAPER—DAMAGES.—An order was given and accepted for an advertisement in a trade journal for fifteen months at the rate of \$500 a year, and after the advertisement had been running for a few months the advertiser ordered it discontinued. *Held*, that the damages are *prima facie* the amount of the wages for the full term, and the burden of proof is upon the defendant to show any mitigation of the damages by reason of what may have been earned from other advertisers.¹

CONTRACTS—FRAUD—SIGNING BY PERSON UNABLE TO READ.—A's agent, in negotiating the sale to the defendant of a second-hand threshing outfit, assured him that the separator was in first-class condition and would do first-class work and, if not, he should be at liberty to return it. B agreed to take it upon these terms and, not being able to read English, signed the usual order form upon being assured by the agent that it was a paper showing the bargain made. *Held*, that B was not bound by anything contained in the order which was an addition to or inconsistent with the verbal agreement made between A's agent and himself, and that he had a right to return the machines when he found that they were not as represented, and to have the promissory notes he had given delivered up and canceled, as the property in the goods had not passed to B.²

CONSPIRACY—COMBINATION OF EMPLOYERS—ILLEGALITY—PUNITIVE DAMAGES.—1. A combination of employers to furnish to each other the names of striking employees and other persons whose employment for any cause is undesirable is not unlawful, so long as it is formed and used for promoting the legitimate business of the employers, but, when the combination is made an instrumentality of injuring others through malice or threats of intimidation, a right of action for resulting injuries arises. 2. The refusal of an employer to withdraw the name of an employee from a blacklist, after becoming aware of the fact that the employee was not a striker, and that he could not get employment from others while his name remained on the blacklist, proved malice on the part of the employer justifying punitive damages.³

COURTS—CONFLICTING JURISDICTION—JUDGMENT—ENFORCEMENT.—A defendant in an action in a state court filed a petition for removal, which was overruled. Thereupon it filed a transcript of the record in the Federal court, and a motion by plaintiff to remand was denied. The action was tried on the merits in the state court, resulting in a judgment for the plaintiff, which was taken on writ of error by defendant to the highest court of the state, and from there to the Supreme Court of the United States, by which it was affirmed on the ground that the petition for removal was not sufficient to oust the state court of jurisdiction. In the meantime the case was also tried on the merits in the Federal court, resulting in a judgment for defendant. *Held*, that, while such judgment was valid, the defendant was estopped to enforce it by the judgment of the Supreme Court obtained at its instance, and that it could not be made the basis for a suit to enjoin the enforcement of the judgment of the state court.⁴

¹ *McDermott v. DeMeridor Co.*, 76 Atl. 330, N. J.

² *American Abell Engine Co. v. Tourond*, 19 Man. Rep. 660, Man.

³ *Rhodes v. Granby Mills*, 68 S. E. 825, S. C.

⁴ *Ill. Cent. R. Co. v. Sheegog*, 177 Fed. 756.

DIVORCE—DECREE—FOREIGN JUDGMENT—JURISDICTION.—1. Where a wife secured a judgment of divorce in Illinois, and the husband remarried, and the divorced wife subsequently sued in the court granting the divorce to annul such judgment, the husband's second wife, who was not a party to either suit, could not in New York enjoin the divorced wife from proceeding in the annulment suit and from questioning in any court the validity of the Illinois judgment. 2. Where defendant in a divorce action in Illinois personally appeared, and the court had jurisdiction of the subject-matter, its judgment is conclusive upon the courts of New York so long as it remains in force, and it cannot be attacked collaterally or its validity be in any way questioned. 3. Where the jurisdiction of a court and the right of plaintiff to prosecute a suit in it have once attached, the right cannot be arrested or taken away by proceedings in another court, and, where plaintiff in a divorce action seeks to have the judgment in her favor vacated, she must apply to the courts of the state where the judgment was rendered.⁵

DIVORCE—"CRUELTY."—"Cruelty," in the statute authorizing a divorce on the ground of cruelty, means physical acts of violence, bodily harm endangering life or limb, and such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the married state; and bad temper, petulance of manner, rude language, want of civil attentions, or angry or abusive words are not sufficient.⁶

DOMICIL—"PLACE OF ABODE."—G, in May, 1884, was married to A, and, while she was still his wife, during the same month he married E, she being his plural wife. Thereafter he went to England as a missionary, and took with him his wife E and her children, and resided and worked there. During his absence in England, his wife A built a house in Salt Lake City with money furnished by plaintiff, and during plaintiff's absence lived therein. G never saw the house nor lived in it until after his return from England, during which time summons was attempted to be served on him in an action brought by L by leaving a copy at such house with his wife A, on which judgment was rendered against him by default, concerning which he had no knowledge until he returned from England. *Held*, that such house was not G's "usual place of abode" within a statute authorizing substituted service by leaving a copy of the process at the defendant's usual place of abode with a suitable person at least fourteen years of age; the term "place of abode" as so used being the place where defendant lives or abides, his "then present residence," and is not synonymous with "domicil."⁷

GAME—WHAT IS TO "SHIP."—One who delivers game birds to a carrier for transportation to a point out of the state violates the statute, providing that no person shall ship any game birds out of the state, though they were taken from the carrier by the state authorities while in the state; the word "ship" meaning delivery to a carrier for the purpose of being transported.⁸

INFANCY—AGREEMENT TO PURCHASE LAND—SPECIFIC PERFORMANCE.—1. The appointment by an infant of an agent to act for him is not void but only voidable if it is to his advantage, and an infant may elect to ratify and take advantage of a contract entered into by an agent for him and the Court will, in the exercise of its equitable jurisdiction, assist

⁵ Guggenheim v. Wahl, 122 N. Y. Supp. 941.

⁷ Grant v. Lawrence, 108 Pa. 933, Utah.

⁸ Trenchard v. Trenchard, 92 N. E. 243, Ill.

⁶ State v. Carson, 126 N. W. 698, Ia.

the infant in enforcing his rights. 2. An infant can purchase land and enforce the contract against the vendor, at least to the extent of recovering damages against the vendor for breach of the contract.⁹

INSURANCE—BURGLARY—THEFT BY MEMBER OF BUSINESS STAFF—ACCESSORY BEFORE THE FACT.—By the terms of a burglary policy the plaintiff's were insured against "loss (or) damage by theft or robbery, with or without violence, or burglary, of the property herein specified, or any part thereof. . . . Provided always that there shall be no claim on this policy . . . for loss by theft, robbery, or misappropriation by members of the assured's household, business staff, or other inmates of the assured premises." A loss was sustained in consequence of a robbery committed by a gang of thieves who gained admittance to the premises through the instrumentality of a porter in the employ of the assured, who, beyond receiving a share of the plunder, took no further part in the theft. In a claim against the underwriters under the policy: *Held*, that the porter was an accessory before the fact and in the same position as if he had been the sole thief, and therefore the case came within the proviso, and the defendants were not liable.¹⁰

INSURANCE, FIRE—WHAT CONSTITUTES "FIRE."—A fire in a furnace of material so highly inflammable in character as to cause such volumes of heat and smoke to escape through the registers into the rooms, damaging the house and furniture, though without ignition outside of the furnace, is a "fire" within a policy of insurance against "direct loss or damage by fire."¹¹

INSURANCE, LIFE—SALE OF BUSINESS—LIABILITY OF BUYING COMPANY FOR SELLER'S BREACH OF AGENT'S CONTRACT.—A life insurance company, which purchases the business and assets of another life insurance company, and agrees to underwrite, assume, reinsure, and guarantee all of the insurance or investment contracts and policies of the selling company, thereby becomes liable to an agent of the selling company in an action to recover the present damages occasioned by the breach of the contract by the sale, and the burden is upon the purchasing company to show that the policy holders did not reinsure, or that they were insolvent. 2. In such an action, brought by the agent against the purchasing company, the makers of installment premium notes are not presumed to be insolvent with respect to installments not due, although at the time of the sale one or more installments had become due and were not paid.¹²

JUDGES—DISQUALIFICATION—"PARTY."—A statute, providing that no judge shall sit in any cause where either of the parties may be connected with him by affinity or consanguinity within the third degree, does not disqualify a judge from trying an action merely because he is the father-in-law of the attorney of plaintiff, who is, under the contract with plaintiff, to receive for his services a specified part of the amount recovered, the word "party" being applied only to the parties to the suit.¹³

LANDLORD AND TENANT—HOLDING OVER—RENEWAL OF TENANCY BY THE MONTH.—A tenant's holding over and paying monthly rent beyond the term of a lease for a year, relating to urban premises, in which lease rent is reserved by the month and is payable at monthly periods, does not, alone, imply a renewal by the year. A renewal of the tenancy by the month is thereby implied.¹⁴

⁹ *Johannson v. Gunmundson*, 17 Man. Rep. 83, Man.

¹⁰ *Saqui v. Stearns*, 102 L. T. 915, Eng.

¹¹ *O'Connor v. Ins. Co.*, 122 N. W. 1038 Wis.

¹² *Israel v. Ins. Co.*, 127 N. W. 187, Minn.

¹³ *Missouri R. R. Co. v. Mitcham*, 121 S. W. 871 Tex.

¹⁴ *Kaufman v. Martin*, 66 S. E. 92, W. Va.

LANDLORD AND TENANT—LEASE—IMPLIED RIGHT OF WAY.—A lease of a room in a hotel, to be used as a restaurant, the room fronting and having its entrance on a street, and being connected with the rotunda of the hotel by a doorway, does not carry by necessary implication the right to use the door into the rotunda; a right of way by implication arising only from necessity, and never from convenience.¹⁷

LARCENY—BROKER—MISAPPROPRIATION OF MONEY.—A broker who was given an order by a customer to purchase stock, places the order with his correspondents, who buy the stock and carry it upon marginal account for him, notifies his customer that it is purchased and of the cost and commissions, receives a check for the amount and deposits it with his firm's account, exhausts that account by drawing on it for firm and individual indebtedness without paying for the stock, which was never taken up from his correspondents, and is shortly thereafter adjudged a bankrupt, is guilty of larceny for the misappropriation of the customer's money.¹⁸

LOTTERY—SPECIFIC PERFORMANCE OF ILLEGAL AGREEMENT.—Where an owner of land divided it into a considerable number of lots, varying widely in value, and made contracts purporting to sell a certain number of lots to various parties, without reference to what lots were to be sold to any particular person, this being left for determination later, and after a certain number of "applications" had been sold, at an appointed time the names of purchasers were by a committee of such purchasers put into one box and the numbers of the lots placed in another, under rules prescribed by and at the direction of the seller, and names and numbers were drawn, the agreement being that the lots drawn in connection with the name of a purchaser should be conveyed to him by the seller, this was a lottery scheme and illegal, and such an agreement was not enforceable by an equitable proceeding for specific performance brought by one who drew certain lots.¹⁹

MALICIOUS PROSECUTION—WANT OF REASONABLE AND PROBABLE CAUSE—HONEST BELIEF OF PROSECUTOR—PROVINCE OF JUDGE AND JURY—QUESTIONS TO JURY—MALICE—REASONABLE CARE IN ASCERTAINING FACTS—SEARCH WARRANT.—1. Although a prosecutor, before commencing the prosecution of a person whom he suspects to be guilty of a crime, must, to protect himself from a subsequent action for damages for malicious prosecution, take reasonable care to acquaint himself with the facts, such reasonable care does not necessarily include making inquiries of the suspected person himself or asking him for an explanation, especially when the prosecutor's solicitor advises him to refrain from doing so.

2. The question of reasonable and probable cause being for the Judge, and not the jury, to decide, after obtaining the opinion of the jury, when necessary, upon any facts in dispute upon which such question depends, it was not in the circumstances of this case, safe or proper to submit to the jury the question "Did the defendants take reasonable care to inform themselves of the true facts of this case?" as covering all facts upon which the question of reasonable and probable cause depended.

3. If the prosecutor has had a search warrant issued and executed in order to obtain evidence in support of his charge, the plaintiff, in a subsequent action for malicious prosecution, would have a right to have that considered in aggravation of damages in the event of his getting a verdict in the action; but, if he fails, he can have no separate cause of action based on the issue or execution of the search warrant.²⁰

¹⁷ *Jemo v. Tourist Hotel Co.*, 104 Pac. 820 Wash.

¹⁸ *People v. Meadows*, 43 N. Y. L. J. 1255 N. Y.

¹⁹ *Glenville Co. v. Grace*, 68 S. E. 301 Ga.

²⁰ *Benton v. Gallagher*, 19 Man. L. R. 478 Man.

MANDAMUS—LICENSE TO PRACTICE MEDICINE—ARBITRARY REFUSAL TO GRANT.—1. Licensing boards are not vested with personal or arbitrary power, but are subject to the control of the courts when it appears they have acted arbitrarily in refusing a license.

2. A party applying for a license to practice medicine in this District is entitled to such license upon a showing that he had been licensed to practice in the State of Maryland by the medical licensing board of that State, and had practiced there for more than two years prior to making his application in this District; that he held a degree of M. D. from the Maryland Medical College, and was of good moral character; and upon refusal by the Board of Medical Supervisors of this District to grant him a license, on the ground that the conditions under which the applicant passed his examination in Maryland were not equivalent to the conditions existing in this District under the rules and regulations adopted by the board, in that such rules and regulations provide for a different system of grading from that adopted in Maryland, mandamus will lie to compel the grant of the license.²¹

MASTER AND SERVANT—AGREEMENT BY SERVANT NOT TO BE PERFORMED WITHIN A YEAR—STATUTE OF FRAUDS.—In 1905 the defendant entered the service of the plaintiff, a dairyman, upon the terms of a written agreement, which was expressed to be terminable by a week's notice on either side. By one of the terms of the agreement it was provided that the defendant should not for thirty-six months after leaving the service of the plaintiff commence, carry on, or be concerned in any way in the business of a dairyman within a radius of four miles of that of the plaintiff. In 1906 the defendant was discharged by the plaintiff. In 1908 he was verbally re-engaged upon the terms of the written agreement of 1905. In 1910 the defendant left the plaintiff's service and started business as a dairyman on his own account within a radius of four miles of the plaintiff's business. The plaintiff thereupon took proceedings in the County Court for an injunction to restrain the defendant from committing a breach of his agreement, and an injunction was duly granted by the learned judge. *Held*, that the agreement being one which was incapable of being performed within a year by the defendant, and it not being the intention of the parties that it should be performed by the plaintiff within a year, the agreement did not come within the exception laid down in *Donellan v. Read* (3 B. & Ad. 899). It therefore came within section 4 of the Statute of Frauds, and, not being in writing, was unenforceable.²²

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—ASSAULT.—Plaintiff and her husband were engaged by defendant company to present their imitation of a hen and rooster at defendant's theater. The actors and stage hands agreed among themselves that at the last performance of the engagement they would engage in a charivari. Plaintiff previous to the time of receiving the injuries, had participated in this charivari. While plaintiff and her husband were giving their performance the other actors were hurling oyster cans, old shoes and other articles at them. During the performance plaintiff mounted a chair, which was not necessary and which was not her custom, and upon stepping to the floor her ankle was struck by a can. *Held*, that there could be no recovery.²³

MORTGAGES—RIGHT OF HOLDER OF PRIMARY INTEREST IN MORTGAGE TO DEAL WITH SECURITY WITHOUT CONSENT OF HOLDER OF SECONDARY INTEREST.—1. The holder of the superior interest in a mortgage on real prop-

²¹ *U. S. v. Custis*, 38 Wash. L. R. 396 D. C.

²² *Reeve v. Jennings*, 102 L. T. Rep. 871.

²³ *Novelty Theater Co. v. Whitcomb*, 106 Pac. 1012 Colo.

erty *held* entitled to satisfy the same of record without receiving payment thereof, and without the consent of the holder of the secondary interest, though the participation agreement between the parties did not expressly give the holder of the superior interest such authority, it appearing that the act of satisfying the mortgage was in good faith, without fraud and for the purpose of protecting the security of the mortgage. 2. The holder of the superior interest in a mortgage *held* not a trustee for the benefit of the holder of a secondary interest.²⁷

MORTGAGES—WAIVER OF MORTGAGE LIEN BY ATTACHMENT.—In an action to foreclose a mortgage the defendant pleaded that the plaintiff had waived the mortgage lien by securing an attachment on the mortgaged goods in a prior action on the mortgage note. *Held*, the attachment was not a waiver of the mortgage lien nor did it estop the mortgagee from later setting up the mortgage.²⁸

MUNICIPAL CORPORATIONS—PUBLIC NUISANCE—RIGHT TO RESTRAIN AND ENJOIN.—The defendants operated a sugar refining plant from which quantities of smoke, soot, dust, and cinders escaped and fell upon the streets and public places of the city and upon the persons and property of the residents. The city council had power to determine and abate public nuisances but had passed no ordinance declaring the defendant's manufacturing plant a nuisance. In an action by the city to enjoin the maintenance of the nuisance, *held*, that in the absence of express statutory authority a municipal corporation cannot maintain an action in equity to enjoin a public nuisance of this character which does not specially affect corporate property, even though the private property of many citizens may be affected thereby.²⁹

MUNICIPAL CORPORATIONS—INJURY TO SHADE TREES IN THE STREET—RIGHTS OF ABUTTING OWNER.—A lighting company having a general franchise and contract with the city for lighting purposes cut and mutilated a shade tree in front of the premises of an abutting owner who did not own the fee in the street. It did not appear that the cutting was reasonably necessary for the lighting of the streets. In an action by the abutting owner for damages, *held*, that plaintiff "has a right in the nature of an equitable easement therein, to grow and maintain the shade tree and to maintain an action against a wrongdoer for injuring the tree."³⁰

MUNICIPAL CORPORATIONS—OBSTRUCTION IN STREET—INJURY TO PEDESTRIANS.—A step four and one-half inches high and ten and one-half inches wide, close up to a building in front of which it is placed, and used as a means of access to it from the street, does not constitute an unlawful obstruction, and does not interfere to an appreciable or unreasonable extent with the use of the sidewalk so as to sustain an action by a pedestrian injured by stumbling over it.³¹

MUNICIPAL CORPORATIONS—NUISANCES—EXERCISE OF POLICE POWER.—The defendant in violation of a municipal ordinance which prohibited the erection of cotton gins within prescribed limits, on the ground that they were nuisances, was erecting a steam cotton gin. The plaintiff sought by injunction to restrain him. Power to regulate cotton gins was not expressly conferred on the town. *Held*, that as the erection of the gin was not a nuisance *per se*, the ordinance as an exercise of the general police power of the town was too broad and hence invalid.³²

²⁷ *Lowenfeld v. Empire City Co.*, 43 N. Y. L. J. 1651 N. Y.

²⁸ *Stein v. McAuley*, 125 N. W. 336 Ia.

²⁹ *City of Yonkers v. Federal Sugar Refining Co.*, 121 N. Y. Supp. 494.

³⁰ *Adams v. Syracuse Lighting Co.*, 121 N. Y. Supp. 762.

³¹ *City of Richmond v. Lambert*, 68 S. E. 276 Va.

³² *Swalm v. Morris*, 125 S. W. 432, Ark.

NATURALIZATION—"FREE WHITE PERSONS."—Revised Statutes, § 2169, relating to naturalization, provides that the title shall apply to aliens being "free white persons" and to persons of African nativity and descent. *Held*, that a Syrian is a free white person.³²

NEGOTIABLE INSTRUMENTS—NOTE PAYABLE ON CONTINGENCIES.—When a promissory note contains special stipulations and its payment is subject to contingencies, it fails to possess the character of a negotiable instrument and is subject in the hands of the assignee to any defense which would be available if it were still held by the original payee. Whenever the payment of a note is expressly made subject to the equities growing out of, and defenses based upon, an existing or contemporaneous agreement, a person taking such note holds it subject to such equities and defenses.³³

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—ALTERATION OF PLACE OF PAYMENT.—The defendant made a note upon a printed form, leaving blank the space after the word "at" in which the place of payment is usually written. The payee filled in the blank and endorsed the note to the plaintiff, a *bona fide* purchaser. *Held*, that the payee had implied authority to do so.³⁴

NEW TRIAL—COERCING AGREEMENT OF JURY.—Upon disagreement, the court instructed the jury that although no one could object as long as a juror held an honest opinion, still it was willful contempt to stick to an opinion regardless of the arguments of others, and then urged them to agree, as a wrong verdict could be corrected by an appellate tribunal. *Held*, the instruction was improper as tending to coerce the jury and to minimize the importance of a verdict.³⁵

PHYSICIANS AND SURGEONS—MALPRACTICE.—1. The degree of skill and learning which a physician or surgeon is required to possess and exercise is that ordinarily possessed and exercised by members of his profession in the same line of practice in the same locality. 2. In the absence of special contract a physician or surgeon is not an insurer, and no inference of negligence can be drawn from the result of the treatment, but there must be evidence of negligence by witnesses qualified to testify. 3. In an action where plaintiff claimed that she was burned in the course of an X-ray diagnosis to which she was subjected by the defendant, the trial court properly refused an instruction that if she was burned in the course of the operation that fact was of itself evidence of negligence and imposed on the defendant the burden of showing that the injury was not caused in whole or in part by his negligence. 4. The general rule in actions of malpractice is that the burden is always on the one alleging it; and even in exceptional cases, where a *prima facie* case is made by proof of the operation and resultant injury, the plaintiff still has the burden of establishing his case by a preponderance of the evidence. 5. The use of the X-ray in the diagnosis and treatment of human ills is recognized and practiced by the medical profession; and no different rule applies in actions against practitioners in this line for alleged negligence than is applied to other practitioners. 6. An X-ray physician, to whom a patient is referred by a competent surgeon who had himself been treating her, for the purpose of having an X-ray diagnosis made, has a right to rely upon the judgment of the surgeon that the condition of the patient is such as to enable her to submit to the operation.³⁶

³² *In re Najour*, 174 Fed. 735.

³³ *Klots Co. v. Manufacturers Co.*, 43 N. Y., L. J., 1327 Fed.

³⁴ *Diamond Distilleries Co. v. Goth*, 126 S. W. 131 Ky.

³⁵ *Levinson v. Zitkin*, 119 N. Y. Supp. 680.

³⁶ *Sweeney v. Ewing*, 38 Wash. L. R. 295 D. C.

POST OFFICE—FRAUDULENT USE OF MAILS—POWERS OF POSTMASTER-GENERAL.—The Postmaster-General has the power conferred on him by law to entertain a charge that a certain person is engaged in using the mails in a scheme or device for obtaining money or property by means of false or fraudulent representations or promises; and where, after due notice to the parties charged and upon a hearing accorded them, he finds the charge proved, and issues a fraud order against them, the correctness of his determination can not be reviewed by certiorari.⁴⁰

PRINCIPAL AND AGENT—PURCHASE OF PRINCIPAL'S PROPERTY BY AGENT.—Plaintiff employed defendant to negotiate a loan to enable the plaintiff to prevent a sale of his real estate under foreclosure proceedings. Defendant did not get the loan. There was a public sale of the property, and the defendant, being the highest bidder, purchased the property. He paid for the property by securing a loan on the property as security. Plaintiff brought action to have a trust declared on the ground that defendant's fiduciary relation made a purchase by him invalid. *Held*, that defendant's relation to plaintiff was not such as would create a trust relationship.⁴¹

QUASI CONTRACTS—IMPROVEMENTS—HIGHWAYS.—The plaintiff, by advice of an officer without authority, repaired a bridge on a county road. *Held*, the county must either allow him to remove the materials used or make compensation for them.⁴²

RAILROADS — CONTRACTS — ULTRA VIRES — ADVERTISING — UNDUE PREFERENCES.—1. A railroad chartered for the general purpose of transporting people, merchandise, and property, had no implied power to make a contract granting the exclusive right of displaying advertisements on its box cars. 2. A state makes it unlawful for any transportation company to give any undue or unreasonable preference or advantage to any particular person, corporation, etc., or to any particular description of traffic, in any respect whatsoever, etc. *Held*, that, a contract whereby defendant railroad gave plaintiff the exclusive right of displaying advertisements on all box cars controlled by defendant, the latter to carry free the material and furnish storage therefor, and transport plaintiff's employes, when engaged in the business, gave plaintiff an exclusive privilege, constituting an undue and unreasonable preference and advantage, and was void.⁴³

RAILROADS—OPERATION OF TRAINS—RIGHT TO COMPEL.—1. A railroad has some discretion in the management of its road and the running of trains thereon, and the courts may not interfere unless the company does not comply with its duty as a carrier; but this duty does not require a company to provide facilities to meet demands that do not, and may never, exist. 2. A railroad company operated parallel lines between two points. The lines were at no place between the points farther apart than three-quarters of a mile. It operated its passenger and freight trains in one direction on each line. No public demand was shown for the transportation of passengers in both directions on either line. *Held*, that, mandamus did not lie to compel the company to operate passenger trains in both directions on one of the lines.⁴⁴

RAILROADS—SAFETY APPLIANCE ACT.—The requirement of the Federal Safety Appliance Act that all cars used in moving interstate traffic shall be equipped with automatic couplers coupling by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is absolute; and it is no defense to an action against a railroad com-

⁴⁰ *Degge v. Hitchcock*, 38 Wash. L. R. 393 D. C.

⁴¹ *Floyd County v. Allen*, 126 S. W. 124 Ky.

⁴² *Clark v. Delano*, 91 N. E. 299, Mass.

⁴³ *Nat. Car Ad. Co. v. R. Co.*, 66 S. E. 88 Va.

⁴⁴ *People v. R. Co.*, 89 N. E. 745, Ill.

pany for its violation by using cars on which the couplers were so out of repair as to necessitate men going between the cars to operate the same that the company used due diligence to keep the couplers in good repair."

RECEIVERS—FOREIGN CORPORATION—APPOINTMENT—FEES.—1. The court has no power to appoint a receiver of a corporation upon the application of a mere creditor at large. The court has no power, in the absence of consent or waiver by or on behalf of a corporation, to decree the payment of expense of ancillary receivership out of its property where the appointment was unauthorized. 2. Compensation of ancillary receivers limited to commissions upon sums of money received and paid out exclusive of other property.⁸⁰

RELEASE—FRAUD.—1. A contract whereby an injured party, for a valuable consideration, releases a railroad company from all claim for damages for the injury, is valid and binding where the minds of the parties have met as to all matters involved in the settlement and the release is procured without fraud, misrepresentation or mistake. 2. Where it appeared that the plaintiff, a woman with little experience in business affairs, was called upon to sign a release the morning after the accident, when she was in a nervous, excited condition, suffering from her injuries, and she testified that she had been led to believe by the agent of the railroad company obtaining the release that it was merely compensation for the loss of her hat and three days' time and did not know that she had signed a release until some days afterwards, it was held that the question of the validity of the release was properly submitted to the jury.⁸¹

SALES—AGREEMENT TO REPLACE.—The contract of a seller of an automobile to replace such parts "as may break in normal service" does not bind him to replace parts which are worn or defective.⁸²

SALES—IMPLIED WARRANTY.—In a present and executed sale of a stallion, by one who is not a dealer in such horses for breeding purposes, there is no implied warranty that the stallion is reasonably fit for breeding purposes, although the seller knows that the vendee buys the horse for such use.⁸³

SEDUCTION—"PREVIOUS CHASTE CHARACTER."—A woman who has been at some time in her life unchaste, but who has reformed and acquired the virtue of chastity, is then a female of "previous chaste character."⁸⁴

SALVAGE—THEORY AND PURPOSE OF REMUNERATION—SERVICES RENDERED UNDER EMPLOYMENT.—The principles which govern the allowance of compensation for a salvage service are not the same where the service is rendered under an employment and where it is volunteered. In the latter case it is more meritorious, and the salving vessel takes the risk of receiving nothing if the service is unsuccessful, and if successful is entitled to a liberal reward; while if employed she is entitled to payment on a quantum merit in any event, and whether entitled to more in case of success depends on the circumstances and the spirit in which the service is rendered.⁸⁵

SCHOOLS—TERM OF EMPLOYMENT OF TEACHER.—A rule of a board of education that teachers should hold their positions during good conduct and

⁸⁰ *Wabash R. Co. v. U. S.*, 172 Fed. 864.

⁸¹ *Moe v. McNally Co.*, 43 N. Y. L. J., 1187 N. Y.

⁸² *Balt. R. Co. v. Morgan*, 38 Wash. L. R. 326.

⁸³ *Barry v. Am. Co.*, 119 N. Y. Supp. 237.

⁸⁴ *Thompson v. Miser*, 92 N. E. 420, Ohio.

⁸⁵ *State v. Preuss*, 127 N. W. 438, Minn.

⁸⁶ *Pacific Mail Co. v. Pac. Cable Co.*, 173 Fed. 28.

efficiency was in the nature of a legislative act, and not a term of each contract of employment. Since the charter of Bayonne contemplates annual appropriations for the support of the schools, the board of education, in the absence of statutory authority, had no power to contract that a school teacher should hold his position during good behavior and efficiency."⁴⁶

SPECIFIC PERFORMANCE—BUILDING CONTRACTS.—The plaintiff asked specific performance of a contract for the construction and operation of a logging tramway. *Held*, a decree of specific performance should not be granted since the contract is one requiring performance of personal services."⁴⁷

SPECIFIC PERFORMANCE—CONTRACT NOT ENFORCEABLE AS A WHOLE.—Three parties held the adjoining front lots on a certain square. They entered into an agreement to create a private alley across the rear of their lots to connect with the side streets. The agreement was not recorded. Later, the owner of one of the corner lots sold to a third party, who refused to be bound by the agreement. The defendant, the owner of the other corner lot, gave notice to the other two parties to the agreement, that unless they began work on the alley within ten days he would close the right of way across his lot. No action was taken, and at the end of the ten days the defendant commenced the erection of a stable at the rear of his lot over the right of way. The owner of the middle lot filed a bill in equity to restrain the further erection of the stable, and for specific performance of the agreement. *Held*, that as the purchaser of the other corner lot had refused to be bound by the agreement there was no longer any consideration for the defendant's promise, and as the agreement could not be carried out as a whole the court would leave the parties to their remedy at law."⁴⁸

SURETYSHIP—DISCHARGE BY ERASING NAME.—The erasure of the name of one surety on a bond, without the consent of the other sureties, discharges all sureties who signed subsequent to the surety whose name was erased. The erasure changes the implied contract of contribution among the sureties. They are presumed to have signed in reliance upon the responsibility of each of the sureties, and the cancellation of the liability of one of them materially alters their obligation."⁴⁹

TAXATION—EXEMPTIONS—ALIENABILITY OF CONTRACT EXEMPTION.—A railroad had a contract exemption from taxation. The State Constitution, adopted subsequently, prohibited the granting of exemptions from taxation. On foreclosure under a mortgage, all the property, rights and franchises of the railroad company were bought in by the State and later granted by it to the defendant, who resisted payment of taxes. *Held*, that the grant by the State did not carry the exemption to the grantee."⁵⁰

TORTS—LICENSEE'S RIGHT OF ACTION ON A MANDATORY STATUTE.—The owner of a building maintained an unguarded elevator shaft contrary to the New York City Building Code. A licensee was injured by falling into the shaft. *Held*, that the act enjoined a duty for the benefit of any person lawfully upon the premises and the violation of the duty was evidence of actionable negligence sufficient to sustain a judgment for the plaintiff."⁵¹

⁴⁶ *Vroom v. Bayonne*, 74 A. 262, N. J.

⁴⁷ *Sims v. Vanmeter Lumber Co.*, 51 South 459 Miss.

⁴⁸ *Bannerot v. Davidson*, 75 Atl. 417 Pa.

⁴⁹ *Hillboe v. Warner*, 118 N. W. 1047 N. D.

⁵⁰ *Great Northern R. Co. v. Minnesota*, 30 Sup. Ct. Rep. 344 U. S.

⁵¹ *Racine v. Morris*, 121 N. Y. Supp. 146.

TRADE MARKS—TRADE NAMES—1. The words "Crown" and "Jamestown," as applied to products of a baking company, are mere fanciful words, and, standing alone, do not indicate origin and manufacture; but in association with other words they have that effect and entitle the user to claim a trade mark for the combination. 2. The trade marks "Crown," used in connection with soda crackers, and "Jamestown," with a kind of cake known as "drops," are not infringed by the use of "Crown" in connection with gingersnaps and of "Jamestown" in connection with "jumbles," a kind of cake four or five times as large and having a hole in the center as large as a "drop," the right to claim a trade mark being co-extensive only with the use made thereof.⁶²

TRIAL—OPENING STATEMENT—DIRECTING VERDICT.—The opening statement to the jury cannot be treated as an admission of facts binding upon the client, so as to justify a directed verdict. It is otherwise where the opening statement shows that the cause of action is contrary to public policy and such as no court would entertain.⁶³

TRIAL—OFFICERS—PROSECUTING ATTORNEY.—A certain degree of discretion is confided to a district attorney in instituting and conducting criminal prosecutions, and he cannot be removed because of his conduct therein, in absence of abuse of such discretion, or a clear showing of corruption or incompetence.⁶⁴

USURY—EXACTION OF BONUS.—In an action to recover a bonus usuriously exacted for money loaned, if the evidence supports a finding that a direct contract was made for the payment of the excessive amount in consideration of the loan, the intent to evade the statute defining usury is presumed.⁶⁵

VENDOR AND PURCHASER—LOSS OF TITLE BY GRANTOR'S ACT.—The plaintiff sued for damages suffered by reason of loss of land resulting from defendant's sale to an innocent party without notice of defendant's previous sale to plaintiff's grantor, the second grantee's deed having been first recorded. *Held*, that the plaintiff had a good cause of action sounding in tort.⁶⁶

WAREHOUSEMAN—CARRIER—CARRIAGE BY WATER ANCILLARY TO BUSINESS OF WAREHOUSEMAN—DAMAGE TO GOODS DURING TRANSIT.—The defendants, who were warehousemen, undertook the carriage of a limited class of goods from import steamers to their warehouse for storage therein. The goods were carried in barges supplied by a firm of barge owners, with whom the defendants had a sub-contract for such transit. *Held*, that as the carriage of the goods was merely ancillary to the defendants' business as warehousemen, they were not liable as common carriers for damage occurring during the transit.⁶⁷

WATERS AND WATERCOURSES—TITLE TO BED OF NAVIGABLE LAKES.—The plaintiffs as owners of lands surrounding a navigable lake, claimed exclusive control over the waters of the lake and sought by injunction to restrain the defendants, their lessees of lands abutting on the lake, from maintaining a boat for purposes of commerce. *Held*, that there was no basis for relief, as title to the bed of navigable lakes is in the state in trust for the public use.⁶⁸

⁶² Virginia Baking Co. v. Southern Biscuit Co. 68 S. E. 261 Va.

⁶³ Pietsch v. Pietsch, 71 Cent. L. J. 81 Ill.

⁶⁴ State v. Hospers, 126 N. Y. 881. Ia.

⁶⁵ Nelson v. State, 71 Cent. L. J. 61 Minn.

⁶⁶ Hilligas v. Kuns, 124 N. W. 925, Neb.

⁶⁷ Consolidated Tea Co. v. Ollivers, 102 L. T. Rep. 648 Eng.

⁶⁸ Conneaut Lake Ice Co. v. Quigley, 74 Atl. 648 Pa.

THE DOCKET.

THE ease and rapidity with which a jury is selected in the English courts has been commented upon by the DOCKET in the last two issues of this Review. The difficulty of empanelling a jury in a criminal case of any great public interest has been illustrated sufficiently during the past few years in the Thaw case in New York and in the graft prosecutions in San Francisco and Chicago. The English habit is no new thing. There was no more trouble in the old days before their criminal procedure was reformed than there is today. To go back to the 17th century when Sir Walter Raleigh was being tried for high treason in that great hall at Winchester, which the DOCKET visited this summer and where hangs the Round Table of King Arthur's Knights and where the bloody Jeffreys condemned Alice Lisle, we read that on that trial when Sir Walter Raleigh was asked whether he would take exceptions to any of the jurors, he answered, "It is my firm opinion that they are all Christians and honest gentlemen, I object against none."

BUT the trouble has been present in our courts for more than half a century. The difficulty of empanelling a jury was never more apparent than on the trial of Polly Bodine, a *cause celebre*, in New York in the year 1844. The house of a man named Houseman, who lived on Staten Island, was burned one night during his absence, and the bodies of his infant child and wife were found in the ruins with marks of violence upon them, showing that they had been killed before the house was set on fire. Polly Bodine was the sister of Houseman and was a handsome woman of thirty-five. She had been on bad terms with her sister-in-law and on the trial several pawnbrokers in New York identified her as having pawned with them jewelry and other articles which had belonged to Mrs. Houseman. It was a much talked of case and most people believed the prisoner guilty. The first trial took place in Richmond County, and after many days spent in selecting a jury and many more in hearing the evidence, the jury announced they could not agree, and were discharged. An attempt to empanel a second jury in the county was unsuccessful, whereupon, upon application of the state, the case was removed to New York City. The court, Judge Edmonds presiding, was two weeks and a half laboriously engaged in an attempt to empanel a jury; between five and six thousand had been summoned

and called as talesmen and upwards of four thousand of those personally examined by the court either as to their fitness for jurors or in relation to their excuses. It resulted in a dismissal of the few jurors empanelled and of an abandonment of a trial within the County of New York. It was said at the time that many who were summoned in Bodine's case had the precaution, before being called, to remark to a bystander: "I think Bodine ought to be hanged," and then, when his name was announced, he truthfully confessed that he had expressed an opinion—and was excused of course. "Had the prisoner," observes a writer of the day, "the good fortune to have had twelve friends among the multitude who attended, they would have been strained out of the four thousand examined, and, by a verdict of not guilty, would have illustrated the fairness of the trial by jury as secured by the ingenuity of the Supreme Court of the State of New York." A second time, after a long struggle over the jury, a trial was had which resulted in a conviction, which, however, was reversed by the Supreme Court on account of numerous errors in the selection of the jury. It being hopeless to get another jury in New York, the case was removed to Orange County. By this time some of the witnesses had disappeared, the prosecuting officers were worn out and tired of the case, and the defense was able to secure a verdict of not guilty.

THE decisions in New York at that time showed that a man was incompetent to serve as a juror in a case in which his opinion of the merits of the controversy had been formed from his own knowledge of the facts in issue, although he was wholly free from all favor or malice towards either of the parties; also, that he was incompetent in a case in which he had formed or expressed an opinion of the merits of the controversy founded on information derived from the newspapers or any source; also, that a man called as a juror might be interrogated as to the fact of his having formed or expressed an opinion of the merits of the controversy and his confession that he had formed or expressed such opinion was of itself evidence of his incompetency.

IN THE Bodine case on the first trial where the jury disagreed, the evidence was very clear, and no one looked for anything but a conviction. Finally the jury came into the court and announced that they could never agree, and they were accordingly discharged. It was soon learned that eleven of them had been for conviction. One of the counsel for the state, Mr. Dewitt, took the liberty of asking the juror who held out against the conviction upon what ground he was for acquittal. This juror, who was

a sort of village oracle of dogmatic proclivities, always disagreeing with everybody in respect to everything, replied that he was not for acquittal.

Mr. Dewitt: "Were you, then, for conviction?"

Juror: "No."

Mr. Dewitt: "What verdict were you in favor of?"

Juror: "No verdict at all."

Mr. Dewitt: "How is that?"

Juror: "It was all circumstantial evidence. I would not render any verdict on circumstantial evidence; that is, not unless it was in the fourth degree."

Mr. Dewitt: "What do you mean by circumstantial evidence in the fourth degree?"

Juror: "Four eye witnesses who swear that they saw the act committed."

Thus, says the author of *Clinton's Extraordinary Cases*, was the life of Polly Bodine saved by this incorrigible juror, who invented the doctrine of circumstantial evidence in the fourth degree.

THE American Procedure in the empanelling of a jury is generally believed to be based on the English Common Law, but it is difficult to say whether it should be described as a survival, or a development, or an abuse of the common law. Certainly nothing like it has been known in England for many a long year. There it is not now the practice to examine on the *voire dire* a juror who is challenged nor to ask him his views on capital punishment, or what he has read about the case in which it is proposed to make him a juror; but objections to jurors are usually intimated to the clerk of the court, who leaves out the names objected to in calling over the panel. A juror may be examined as to his legal qualifications to be on a jury or his fitness to serve, but disqualification for partiality must be proved by extrinsic evidence. And partiality or bias means a different thing there from what it does here. It means that the juror has a leaning towards one of the parties which makes him an unfit judge, not that he has formed an opinion on one side from what he has heard or read, for it does not follow that when he hears the evidence he may not change his opinion—the English view, as the *DOCKET* has pointed out, being that the fact that a man forms an opinion from the facts as they have come to his ears before the trial, does not prove that he is not an impartial arbitrator, it only proves that he is not a cold-blooded fool.

THE leading English case on the subject is *King v. Edmonds* (4 B. & Ald. 471). It was a charge of conspiracy and the Lord Chief Baron who presided had refused to allow questions to be

put to the jurymen as to whether they had before the trial expressed themselves adversely to the prisoners. The matter was considered by the full court of King's Bench and the ruling was unanimously sustained, the Chief Justice of England delivering the judgment, which is very full and clear as to the law. This challenge, he said, was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression, by extrinsic evidence, but it was proposed to obtain proof, by questions put to the jurymen themselves. The Lord Chief Baron refused to allow such questions to be answered; and, in his opinion, he was right in this refusal. It does not appear, distinctly, in what precise form the question was propounded; but in order to make the answer available to any purpose, if it could have been received, it must have been calculated to show an expression of hostility to the defendants, or some of them, a preconceived opinion of their personal guilt, or a determination to find them guilty; anything short of this would have been altogether irrelevant. The language of Sergeant Hawkins upon this subject (Lib. 2 c. 43, s. 28), is, that if the jurymen "hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." So that, in the opinion of this learned writer, the declaration of a jurymen will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is clearly settled, that a jurymen cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment. The charge of Babington to the triers, as given in the Year Book, (7 Hen. 6 fo. 25) is thus. Addressing himself to the triers, he says: "If, whether the matter be true or false, he will pass for the one or the other, in that case he is favourable (*i. e.*, biassed and therefore incompetent); but if a man has said twenty times that he will pass for the one or the other you will inquire, on your oaths, whether the cause be for affection that he had to the party, or for the knowledge he has of the matter in issue: if for affection that he has to the party then he is favorable but otherwise not; and if he has more affection to one than to the other; but if he has a full knowledge of the matter in issue, if he be sworn he will speak the truth, notwithstanding the affection he has for the party, then he is favorable." These ancient authorities show, that expressions used by a jurymen are not a cause of challenge unless they are to be referred to something of personal ill will towards the party challenging.

WHILE it is sometimes intimated by English writers that it is hardly logical to exclude the juror as a witness to prove his own impartiality, yet the inconvenience of exposing jurors to an elaborate or fishing inquiry as to their qualifications is most obvious; and the exercise of such a right, if allowed, enables every juror who wishes to escape from the box to give answers as to his views on punishment or some other subject which will insure his release from attendance. And is it not clear that if a man desires to get on a jury to serve in the interest of a suitor or a prisoner, he will not scruple to swear that he is impartial and has not formed an opinion. The New York way, as illustrated in the Polly Bodine case, of accepting the men who have not got any impression from what they heard, and rejecting all those who have, succeeds in taking all the stupid ones and leaving out all the thoughtful ones.

It is often said that we are the most conservative people in the world. Our constitutional safeguards and the limitations which are put upon speedy legislation, have trained us for a century in this habit. The present agitation for law reform is a striking instance of this. It finds us still following the technical precedents which we brought from England, but which have been abolished there for more than half a century. It was in the first half of the nineteenth century that Jeremy Bentham, the first law reformer began his crusade; it was in 1852 that Charles Dickens attacked the Court of Chancery in Bleak House with all the success that Mrs. Stowe afterwards achieved in attacking slavery in Uncle Tom's Cabin. And it was in 1826, over three quarters of a century ago, that Lord Denman, Chief Justice of England, speaking in the House of Lords in favor of a bill to reform the procedure in chancery, thrilled the house by the recital of some cases which had come under his observation. "Really," exclaimed the speaker, "after a history of the consequences of delay as this, and after seeing the ghost-like forms of the suitors that are daily hovering about the Court of Chancery, miserable, heart-wearied, heart-broken, their hopes blasted, and their fortunes squandered, the admirable description by the poet, Spenser, would appear no exaggeration," and then he quoted, with great effect, the lines:

"Full little knowest thou who hast not tried
What Hell it is in suing long to bide,
To fret thy soul with crosses and with cares,
To eat thy heart with comfortless despairs,
To fawn, to crouch, to write, to ride, to run,
To spend, to give, to want, to be undone."

But none of the cases which the Chief Justice cited are worse than some not so bad, as those which are appearing each month

under the heading, "The Laws Delay," in the Current Topics of this REVIEW. The farmer who was killed while a passenger on a railroad and whose representatives recovered \$5000 after three trials and two reversals, and after seven years in the courts; the Polish laborer who recovered judgment after judgment which the Appellate courts kept on reversing until when they did allow one to stand after seven years, the defendant and his bondsmen had become insolvent and the plaintiff got nothing; the miner whose case was even worse; the emigrant who could not get the small sum of \$300 of which he had been swindled, until six years had gone by and his life had been wrecked by poverty; the woman in Philadelphia whose case against the city for an injury was not reached for trial for sixteen years; the relatives of the victims of a marine disaster who could not learn until nine years and a half had gone by that the courts could not give them any relief; the colored man in Alton, Illinois, who had to go through seven trials in the lower courts and five hearings in the Supreme Court, and, after ten years, when his children were too old to take advantage of it, the Supreme Court decided that there never was anything for a jury to try and granted the *mandamus* asked for; the locomotive fireman and the woman whose cases were lost by an unnecessary hard construction of the Statute of Limitations; the hair-splitting ruling of the Supreme Court of Illinois in the case of a child injured upon a turn-table; the sick woman who was being driven from the hospital to her home, and after more than two years the lawsuit has evidently just begun—is not this a record to be proud of? The English law-givers, it is said, were thrilled by Denman's words. But where is the American Chief Justice who is telling our law-makers of the wrong and the sufferings and the injustice that he sees every day in the court in which he sits, unmoved and indifferent?

THE perusal of such cases of wrong committed by courts of justice are so harrowing that the DOCKET was seeking a livelier and more cheerful topic when he ran across another illustration that he records on account of its sheer absurdity. It is a note of opera *bouffe*, in the song of legal delay and uncertainty. Would not one think after a century and more of law making, with scores of law schools, with increased requirements for admission to the bar, and with judges selected by the voice of the people, which is the voice of God, that one whose cat was killed on her door-step by a neighbor's dog might expect to find a tribunal that could decide for or against her claim instantan? But the lady in question, when she brought an action in the Municipal Court at Brooklyn, N. Y., and obtained judgment, had to follow it to the Supreme Court of the State, where a new trial was granted and a learned written opinion was filed. It had taken more than

a year to get this far. Again the case of poor puss is tried and the owner gets another verdict, which again goes to the Supreme Court, where this time, accompanied by another learned opinion, she is allowed to collect. (*Buchanan v. Stout*, 108 N. Y. Supp. 38, 123 Id. 724.) She doubtless retires from the judicial battle a sadder and a wiser woman for she had much better have replaced the murdered pet with the most expensive Angora kitten than to have ventured into that most costly of marts, a court of law.

IN PURSUING the cat case, the DOCKET came across a number of amusing cases of animals in court, all of them in England and none of them, one may be sure, in the Appellate courts. Long ago an English judge laid it down (and this is the American rule), that every dog is entitled to one bite, which is another way of saying that the owner of an animal, not naturally ferocious like the lion or tiger, is not responsible for an injury it does to another, unless he has notice of its vicious disposition, and that it bit some one before, is evidence of that kind of disposition. But the one bite rule is shaken by a decision of a county court, where it was not proved that the offending animal had actually bitten anyone before it bit the plaintiff, but the judge found that, to the knowledge of the defendants, it had a propensity to bite people, and gave a judgment in favor of the plaintiff. There is some color of authority in favor of the popular view. In *Beck v. Dyson* (4 Camp. 198), Lord Ellenborough non-suited the plaintiff because, although the dog was proved to be of a savage disposition, there was no proof that it had previously bitten anyone; and formerly in England it was usual to aver in the declaration that the dog was accustomed to bite mankind. However, in *Worth v. Gilling* (L. R. 2 C. P. L.) the Court of Common Pleas held that it was enough to show that the dog had, to the knowledge of the owner, evinced a savage disposition by attempting to bite, and that decision has been followed ever since. But where a dog had a clear record, except for the unhappy incident that having once fallen into bad company it had chased and worried a goat, the Queen's Bench held that there was no evidence of a ferocious disposition to human beings. (*Osborne v. Chacqueel*—2 Q. B. 109.) This opinion is based on a sound appreciation of canine nature. There are many dogs, addicted to worrying other animals or eager to engage in quarrels with their own kind, who never think of hurting human beings. The existing state of the law is, however, not altogether satisfactory, and there is much to be said for the view that the owner of a dog should be bound to keep it at his risk. At present the law has a more tender regard for cattle than human beings.

A COURT, the like of which this country has never seen, is about to open in England for the second time in more than seventy years, but its very existence is an illustration of the orderly and well appointed setting of any great function in an European country. The DOCKET has many times been present at a public dinner or reception in the United States where all was confusion and no one knew where he was expected to sit or what he was expected to do, as nothing had been planned beforehand, but everything had been left to take care of itself. He recalls the annual banquet of the American Bar Association at Portland in 1907, where an assemblage of gentlemen of the bar had to fight like a mob of voters at a primary to get their places at the table; and he remembers a meeting of the Missouri Bar Association where a half hour before the time set for the dinner, the landlord announced that all the waiters were on a strike and that he could do nothing; whereupon the treasurer of the association,—since then a judge of the Supreme Court,—bribed the servants with a promise that they should be the residuary legatees of all the wine and spirits not consumed during the evening. The dinner was duly served, but the next morning most of the trees in the hotel grounds sheltered a negro dead asleep and dead drunk.

THERE is seldom any hitch at a foreign function of this kind. Not only the servants, reared and trained in their particular service from their youth, but everyone who has any duties to perform knows officially what is required of him. And that the ceremonies at the coronation of George V shall be according to precedent in all respects is the reason why the Court of Coronation Claims has been called together by Royal proclamation. The Lord Chancellor, the Chief Justice of England, several of the Lords of the Appeal and of the Privy Council are members of this unique court. It has not met since the year 1901, when it passed upon the ceremonies at the coronation of Edward VII, and before that it had not sat since the coronation of Queen Victoria, sixty and more years earlier. But it is a court of great antiquity; the first record of its existence is at the coronation of Richard II, in the first part of the fourteenth century, and all through the centuries since then, whenever a new sovereign has to be crowned, this tribunal assembles.

THE decisions at the coronation of Edward VII have been reported in a volume entitled "The Court of Claims, by G. Woods Wollaston, M. A., L. L. M., Barrister-at-Law of the Inner Temple." It is interesting to a student of Real Property to find that many of the claims grow out of the tenure of Grand Serjeanty, which

according to Coke, is where "a man holds his lands or tenements of our Sovereign Lord the King by such services as he ought to do in his proper person to the King, as to carry the banner of the King, or his lance, or to lead his army, or to be his Marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his Chamberlaines of the receipt of his exchequer, or to do other like services." Tenures of this kind have been abolished in England, but the statutes expressly reserve the honorary services of Grand Serjeantry. The coronation claims not founded on this tenure are based on the services which the particular claimant or his ancestors had performed at the coronation of a previous monarch. A full report of one case may be of interest to those to whom Mr. Wollaston's Reports are not accesible. It is the petition of the Dean and Chapter of Westminster to "admit the said Dean and Chapter, and their Ministers, to perform the said services as the Abbots and Convents as their Ministers at all times heretofore have done, and to have such allowances and fees as the Abbots have had during the time aforesaid, that is to say:

First:

Ten yards of scarlet,
Six ells of dark colored cloth,
Six yards of sarcenet,
Two pieces of double worsted,

For the Dean's robes.

Also:

Four ells of black cloth, and a piece of double worsted for each of the Dean's three Chaplains for their robes.

Also:

Robes for six Ministers of the said church by the King's gift.

Also:

The King's Upper Vestments, in which he comes into the church at his coronation.

Also:

All the oblations and offerings at the time of the coronation.

Also:

The stage, thrones, royal seats, tapestry, chairs, cushions, carpets, cloths, and all the ornaments with which the stage and the church shall be embellished at the time of the coronation.

Also:

The four poles or staves which support the canopy and the four little bells that hang at each corner of the canopy.

Also:

The blue cloth upon which the King walks from the west door of the church to the stage.

Also:

The Great Chantor of the church to have an ounce of gold by the hands of the treasurer of the King's Chamber.

Also:

A hundred manchets, the third part of a ton of wine, and fish according to the bounty of his said Royal Majesty for the said Dean and Chapter's repast on the coronation day."

The petitioners were represented by counsel who showed that their claims had always been granted and were allowed at the coronation of Queen Victoria. Whereupon the following judgment was delivered by the court. "It is considered and adjudged by the court that the claim of the said Dean and Chapter be allowed, except as to the retaining and keeping the robes and ornaments of the coronation in the vestry of the Collegiate Church of St. Peter, Westminster, which the said Commissioners do adjudge to be kept there, unless His Majesty shall at any time be pleased to order the same to be kept elsewhere; and also that the fees claimed by the said petition be referred to the pleasure of His Majesty."

Most of the claims are as curious as this to an American lawyer,—as for example the claim of the Duke of Somerset to carry the Orb; of the Duke of Richmond to carry the Sceptre with the Dove; of the Duke of St. Albans, to be assigned a place at the coronation in his capacity of Hereditary Falconer; of the Duke of Argyll, to be permitted to carry the rod or baton of his office of Heritable Master of His Majesty's Household of Scotland; of the Duke of Roxburghe, to bear the staff of Saint Edward; of the Earl of Huntington, to carry the sword of State; of the Sheriffs of London, to walk in the procession; of Sir Henry Bernard, to be bow bearer; of the Archbishop of York, to place the crown on the Queen's head (the Archbishop of Canterbury having the indefeasible privilege of crowning the Sovereign); of the Bishops of Durham and Bath and Wells, "to support His Majesty at the coronation"; of Mr. H. Seryngeour Wedderburn, "to carry a white wand as symbol of his office of Lord High Steward of Ireland"; of the Duke of Newcastle, "to provide a glove for the King's right hand"; of the Barons of the Cinque Ports, "to bear the canopies within Westminster Abbey"; of Mr. J. T. Roede Morley, "to bear the Royal Standard of England"; of the Mayor and Council of London, "to bear the crystal sceptre or mace"; of three different petitioners, "to carry the Great Spurs"; of the

Marquess of Cholmondeley, "to be allowed forty ells of crimson velvet and a box containing seventy-three seats at the coronation"; of the Duke of Newcastle, "to provide a glove for the King's right hand and support His Majesty's right arm while he is holding the sceptre"; of the Earl of Errol, "to walk in the procession with a silver baton tipped at each end with gold with His Majesty's arms at one end and his own at the other"; of the scholars of Westminster School, "to be present at the Abbey and acclaim their Majesties"; of the editor of the London *Globe*, "to be present and report the proceedings as his predecessors have done at former coronations"; of Dr. Robertson, "to be present as Honorary Surgeon and Oculist." Other novel and unusual claims were: to be Chief Butler; to be Almoner; to present three maple cups; to present two falcons; to serve the King with a towel when he washes before the banquet; to be Larderer; to furnish a mess of dillegroust; to be Naperer; to be Sergeant of the Silver Scullery; to make wafers; to be Carver and to be Panterer.

WHAT a mess of dillegroust is, the DOCKET knows not, perhaps it is the English for Bouillabaisse, that "rich and savory stew" in the South of France,—the DOCKET tasted it at inn on the Mediterranean last winter—which Thackeray has immortalized in one of his ballads as it was served with a bottle of Chambertin with the yellow seal at the Tavern of Terry, on the New Street of the Little Fields, in Paris:

"This Bouillabaisse, a noble dish is,
A sort of soup or broth or brew,
Or hotchpot of all sorts of fishes
That Greenwich never could outdo.
Green herbs, red peppers, mussels, saffron,
Soles, onions, garlic, roach and dace;
All this you eat at Terry's Tavern,
In that one dish of Bouillabaisse."

The DOCKET hardly knows the duties of the Naperer, the Almoner and the Panterer, and it is difficult to understand why one should desire to be Carver at a great banquet. But after all, it remains true that it is well when you set out to do anything, to see to it beforehand that it shall be well done.

BOOK REVIEWS.

THE LAW RELATING TO INTOXICATING LIQUORS.—By HOWARD C. JOYCE, of New York City, author of "Law of Injunctions," "Law of Indictments," etc. Albany, N. Y. Matthew Bender & Company. 1910.

Mr. Joyce has prepared a book of 950 pages upon the construction and application of the constitutional and statutory provisions relating to traffic in intoxicating liquors and violations of the liquor laws. This is certainly a wide field and considering the manner in which our state legislatures are grinding out liquor laws at every session, many of them never intended to be enforced, and most of them oppressive, ill-considered and dishonest, the lawyer who wants to know just what these laws mean and how they may be construed by the courts, will be glad to have so exhaustive a digest as this at his call. The present prohibition wave as it is called does not yet seem to have spent its force. The ordinary citizen watches it sometimes with amusement and generally with indifference, knowing well, like the American in Kipling's poem, that he is going "to flout the law he makes." The book treats in regular order of definition and terms; the Federal constitutional provisions relating to state laws; the power of the state to regulate the traffic; particular statutory provisions; municipal powers and regulations; licenses; local option laws; civil damage acts; search and seizure laws; injunction and abatement; clubs and evidence.

The chapter on clubs is valuable and shows a large amount of legislative and judicial decision on this subject.

A social club is simply a co-operative home. It enables a number of persons who could not individually afford certain luxuries, as they might be called, to obtain them by subscribing to a common fund and to enjoy in common the things which that fund can procure. It is not in any sense engaged in business or trade, and its property is beneficially owned in common by the members. So far as it can be used by all the members no special charge is made against any man, but everyone pays alike either in monthly or quarterly dues. Thus the use of the sitting rooms, the reading rooms, the magazines and newspapers and all those things which are not consumed in the use are free to every man, but where one member must have a greater use than another, as where he occupies one of a restricted number of rooms adapted for sleeping purposes or where he consumes food or drink of the common property he pays therefor as this is the only equitable way of apportioning this expense among the members. But it is clear that the club in neither one case or the other is making a sale to a member of anything at all. In the case of a meal, the furnishing of individual articles at that meal cannot be said to be a sale either. Even a guest at a hotel who sits down to the table agreeing impliedly to pay the regular price of the meal, and who finds on the

table butter or salt or wine or fruit and who helps himself to those things, at his will, cannot be said to have bought those things—if he had he would certainly have a right to carry them away at his pleasure. But the contract of the guest is that the inn-keeper will furnish him the meal and not that he will sell him any particular article. Notwithstanding this not a few courts have ruled that the furnishing of liquor to the members of a club is a sale of liquor within the dramshop laws of a particular state. The cases on this point cited by Mr. Joyce will show that they are founded not on logic and legal construction—but on an idea that for the purpose of avoiding the liquor laws of a state or a community, people frequently form clubs for the very purpose of selling and purchasing the liquors they so much desire. This is very true, but it reveals a great weakness in our law, in our lawmakers and in those in whose hands the execution of the law is placed that they are not able to distinguish between a real and a fake club. The decisions of those courts that hold that the distribution of liquor among the members of a club is not a sale, clearly distinguish between the two kinds of clubs, the kind where the object is social, literary, scientific, or for the purpose of physical culture, and of which the drinking of liquor is only an incident like the reading of a newspaper, the taking of a meal or the smoking of a cigar, and the kind which is formed as a mere scheme to sell liquor in evasion of the law. This is the law of England; the licensing acts not being applied to *bona fide* clubs where liquor is distributed among its members. For the English law is well settled that the supply of liquors to a member is not a “sale” within the acts but is a release by the other members of their share in the property. But the English Licensing Acts are enforced in a way that ours are not, and no organization calling itself a club which is really a dramshop can exist for a day. The authorities have a right and do examine into the charter and rules of the club, and if they find that it is a real club they issue a certificate which exempts it from further interference so long as it maintains its *status*. If it cannot come up to the test of *bona fides* then it must have a license like a regular dramshop or go out of business.

The liquor laws of some of our states have called into existence multitudes of fake clubs. Their existence is a standing disgrace; but there is no reason in the world why a law should treat alike the co-operative home and the co-operative blind tiger. It is but a step from this to a legislative declaration that every man's house in which may be found a thimbleful of intoxicants is a “dramshop.”

WORK ACCIDENTS AND THE LAW.—By CHRYSTAL EASTMAN. Member and Secretary New York State Employers' Liability Commission. The Pittsburg Survey. New York Charities Publication Committee. 1910.

This is the record of an investigation made possible by the Russell Sage Foundation, to determine whether our work accidents, which are of daily occurrence and more numerous than in any part of the civilized world, do not call for some change in our laws, considering their enormous eco-

nomie cost to the workman, his family and to the state. The investigation was restricted to Allegheny County, Pennsylvania, one of the great centers of industrial activity, but the information drawn from this quarter could be duplicated in many parts of the United States. In that one county, in one year, 526 men were killed by work accidents, and 509 men were more or less severely injured; and if we go outside of this, we find that in the United States, in 1907, 272 railroad employees were killed while engaged in coupling and over four thousand injured. This is only part of the yearly tribute our modern industrial struggle pays in dead and wounded—a number far beyond anything of the kind in the case of modern public war. The problem is set out in the beginning in four stated cases as follows:

I. In December 4, 1906, B, a young structural iron worker, employed by the Fort Pitt Bridge Company, while passing over a scaffold to get to his work on the Walnut Street Bridge, Fourteenth Ward, Pittsburg, fell 35 feet to the ground and was killed. Testimony at the coroner's inquest brought out the fact that a plank broke under him. Two pieces of the plank were picked up where they fell. At the broken end of each, the frost and dirt had worked into the wood several inches, testifying eloquently to an old crack of at least two weeks' existence according to the statements of those who looked at the pieces. B had nothing to do with the building of the scaffold.

II. On May 1, 1907, K, a Lithuanian angle-shearman, employed by the McClintic and Marshall Company, at Rankin, Pa., had finished his work for the day and, in order to get some waste with which to clean his hands, went to a big punching machine with which he was familiar. It had a heavy fast-revolving wheel, boxed in with iron down to within two or three inches of the floor, to guard the workmen from accident. At one corner of the machine, in a hole, was some waste. According to the statement of the superintendent, K got down on his knees and, leaning with his left hand on the greasy platform a few inches from the wheel, reached with his right hand for the waste. As he bore his weight on his left hand, it slipped and slid into the wheel. In a second the hand was crushed.

III. On October 17, 1906, R, a Russian laborer employed at \$1.60 a day by the Iron City Grain Elevator Company, of Pittsburg, was sent with two other men to do some work in an adjoining building, used by the company for storage. On the floor above them grain was stored in bags. The support of the floor gave way and it fell. One of the workmen escaped, another was injured, R was killed. At the inquest a building inspector testified that the floor supports were obviously inadequate. R had a wife, and four children, ages ten, six, five and two; but he had no savings. According to Mrs. R, the claim agent of the company offered to settle with her for \$400, which she refused. She put her case in the hands of a lawyer, and suit was entered for \$20,000. Mrs. R got some washing to do; the city poor relief gave her \$6.00 worth of groceries a month; she begged at the door of the Catholic Church on Sundays; her sister, with a family of six, did what little she could; an occasional \$10 was advanced by her lawyer. She was seen in severe winter weather.

with shoes so old that her feet were exposed. Six months after the accident another child was born; it was the end of the year before her suit came to trial. The court instructed the jury to return a verdict for the defendant. The woman had lost her case.

IV. On August 5, 1907, R, a United States postal clerk, was working in the Baltimore & Ohio yards in Pittsburg. The engine to which his car was attached collided slightly with another, so that by the jar he was thrown against one of the iron hooks on which mail pouches are hung and a bone behind his ear was injured. He was four days in the hospital, the charges for which the railroad company paid. He did not go back to work for four weeks. During this time his salary was paid in full by the government, \$83.30. He received in addition \$64 from a Mail Clerks' Association to which he belonged and to which he paid dues. He settled with the railroad for \$250, of which his lawyer's fee took \$100. Thus R's slight injury, resulting, so far as we know, in nothing permanent, gave him a month's vacation on full pay, with \$150 thrown in.

The problems growing out of these cases are considered by Mr. Eastman from the social as well as from the legal side. From the former it would seem that in the cases of B, K and A, the accidents resulted in great suffering to their families and much cost to the community, while in the case of R, the injury left him much better off than if he had not been hurt. From a legal standpoint, in the present state of law, it is doubtful if anyone of the sufferers could have recovered damages against the employer. The fellow-servant doctrine and the doctrine of assumed risk would stand in the way.

But the common law in regard to work accidents seems to be on its last legs. Congress has practically overthrown it in the Federal Employers' Liability Act. New York and Montana have made a start in the same direction. A commission, appointed by the Governor, is now considering the subject in Missouri and the legislatures of many states will be discussing the question this winter. At the convention of the International Law Association, held at London last August, this was one of the leading subjects of discussion.

The law of most, if not all of the continental nations made the employer liable for the negligence of one of his employees which caused injury to another employee, in the same manner as if the latter were a stranger; and did not admit the defense of common employment and assumption of risk by an employee, which were so unfortunately and illogically adopted by the English courts and by the courts of the United States. But in the last twenty-five years or so, most of the European countries in order to fix definitely the amount of compensation to be paid an injured servant and not leave it to the whim of a jury have passed statutes making the employer practically an insurer of his workmen's safety. These laws are founded (1) upon the theory that when a person on his own responsibility and for his own profit sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences, but that the law should determine the limit of his liability; (2) upon the principle that each industry should bear its own cost in human life as well

as in wear and tear on machinery; (3) upon the practical ground that the compensation required, becoming a regular cost of production, would be transferred by the employer to the consumers of his product in the form of a slightly increased selling price, and thus would result in taking a share of the economic loss of each accident in each industry from the worker's family and distributing it among the whole body of consumers, upon whom it would be no burden at all.

England has discarded its old rule and so have most, if not all, of the British possessions. The United States, with its well-known conservative habit, is the last of the nations to fall in with the procession. The statutes of the different countries are not the same and the points in which they vary from one another include the following:

1. Whether the employer is personally liable to the employee or bound to provide or contribute to the cost of an insurance fund out of which payment is to be made.
2. Whether, when the employer is liable, his liability is for accidents, however caused, or only for those due to negligence of the superintendent appointed by him or by his authority, or to the defective state of the appliances used in the work.
3. The occupations to which the enactments relate.
4. The maximum amount of annual earnings which exclude an employee from the benefit of the act.
5. The acts of the employee in relation to the accident which disentitle him to establish his claim.
6. The extent of the claim of the employee or his dependents.
7. How the statute is to be administered.
8. Whether sickness and disease not arising from accident are to be provided for.
9. The bearing of the enactment upon the limit of liability of ship-owners for loss of life or personal injury.
10. Whether the employee should be entitled to enforce a claim against a foreign shipowner residing out of the jurisdiction of the courts of the country where the employee resides, by arrest of his ship, situate for the time being within the jurisdiction.
11. Whether the employee should be entitled to contract with the employer, under any and what circumstances, not to claim the benefits of the enactment.

To those who are now engaged in investigating and legislating on this important topic this book will be of the highest possible value.

ETHICAL OBLIGATIONS OF THE LAWYER.—By GLEASON L. ARCHER, LL. B.
Boston: Little, Brown & Company. 1910.

This is a valuable contribution to the literature on the subject of Legal Ethics. It attests the profession's awakening to the necessity of remedying the shortcomings for which the aroused public is calling it to account. Dean Archer is in sympathy with the movement to codify and make more definite and binding the recognized ethical principles of

the profession, and this volume, as its preface states, "is a treatise explanatory of the principles underlying the rules of professional conduct adopted by bar associations, together with such other principles as would confront the lawyer in his everyday practice." Canons of ethics framed by lawyers for their own guidance seem to need explanation and amplification as much as statutes codifying the law of sales or the law of negotiable instruments.

The volume is a companion to the author's "Law Office and Court Procedure," which appeared a few months ago. Though intended to be used by lawyers generally, it will find its sale among law students and young practitioners. The chapter on "Location of Law Office," for instance, could only have been intended for them. With the exception of the two chapters on "Liabilities of a Lawyer to His Client" and "Disbarment and Suspension," there is little to interest the experienced practitioner. But there is much of wholesome suggestion to the younger man and it is given in Dean Archer's most attractive vein. His professional ideals are never in the background—and he would have lawyers guard their profession's honor more closely. "How long," he asks, "would the clergy be honored and respected by the public if the clergymen were to admit generally, even for the sake of a false sense of humor, that as a class they were hypocrites and dissemblers?" And he cannot escape this analogy between the "law and the gospel." "Candidates for the clergy are taught that there are certain worldly customs that they must lay aside upon entering the profession. The same attitude should perhaps be taken by the lawyers of the land." In an interesting discussion of lawyers and politics, he points to Mr. Justice Hughes to illustrate "the possibilities awaiting the upright, fearless lawyer who enters politics in the full maturity of his powers."

An appendix to the volume contains the American Bar Association Canons of Ethics, Hoffman's Fifty Resolutions in Regard to Professional Deportment (both of which are the subjects of frequent reference in the text), and a schedule of legal fees recently adopted by a prominent bar association in New England.

QUESTIONED DOCUMENTS.—A Study of Questioned Documents with an outline of Methods by which the Facts may be Discovered and Shown. By ALBERT S. OSBORN, Examiner of Questioned Documents. Two hundred illustrations. Rochester, N. Y. The Lawyers Co-operative Publishing Co. 1910.

Mr. Osborn's book is a study of the application of scientific methods to trials in court, and he insists that the lawyer should have special knowledge of such matters in all cases where he intends to present or to utilize the evidence of an expert, so that he may be qualified to test in advance the force and truth of such testimony, and most important of all, that he may be prepared to cross-examine adverse witnesses with intelligence and skill. A case is always in grave danger if an attorney is trying by the aid of witnesses to get before a jury that which he himself does not clearly understand. The successful lawyer is he who not only

knows the law, but knows the facts. As well said by a reviewer in the *Journal of Criminal Law and Criminology*, with the exception of treatises on Medical Jurisprudence we have no legal literature on any of the sciences in their relation to law, and none whatever of a similar plan and scope to the present work. After a classification of the various kinds of questioned documents the author treats of standards of comparison, of photography, the microscopic and other instruments and appliances used in the study of handwriting and then of the various technical elements of writing such as movements, line quality, alignment, pen position, pressure and shading and arrangement, size, spacing and slant in writing. Writing instruments, the various systems of writing, variety of forms and mathematical calculations applied to questioned writing are next considered. These chapters are preparatory and lead up to a full discussion in separate chapters of simulated and copied forgeries, traced forgeries, and anonymous and disputed letters. Supplemental to this discussion the author treats of ink and paper in relation to writing, of methods of determining the sequence of writing, erasures and alterations, additions and interlineations, of the age of documents and of methods of detecting forged typewriting. Finally, there is a chapter on the conduct of a questioned document case in court.

Mr. Osborn's work can have no higher endorsement and no more weighty recommendation to the lawyers of the land than the introduction written by Professor John H. Wigmore, the great American authority on evidence, which we take the liberty of quoting in full:

"A century ago the science of handwriting study did not exist. A crude empiricism still prevailed. This hundred years past has seen a vast progress. All relevant branches of modern science have been brought to bear. Skilled students have focused upon this field manifold appurtenant devices and apparatus. A science and an art have developed. A firm place has now been made for the expert witness who is emphatically scientific, and not merely empiric.

"Each age has its crimes, with the corresponding protective measures—all alike the product of the age's conditions. In each age, crime takes advantage of conditions, and then society awakes and gradually overtakes crime by discovering new expedients. In modern history—since Charlemagne and the beginning of the recivilization of Europe, some twelve hundred years ago—there have been two great epochs in the history of documents. In the first, skin-parchment is the vehicle, and writing is an esoteric art for the monkish few. Forgery flourished in the middle ages, chiefly as a successful method of acquiring land titles. The forged Decretals of Isidorus come down to us as a typical imposition of that age. In the next epoch, paper is made, then printing is invented, and education in writing becomes gradually almost universal. Amidst these new conditions, the falsifier again outstrips society for a while. A Chatterton and a Junius can baffle the community. Well down in the 1800s, the most daring impositions remain possible. But society at last seems to have overtaken the falsifier once more. Science and art, in the mass, are more than a match for the isolated individual. We have now apparently entered

further upon a somewhat variant documentary epoch—that of the type-writing machine. But even this novel possibility will remain within the protective control of science—as the present book shows.

“The feature of Mr. Osborn’s book which will perhaps mark its most progressive aspect is its insistence upon the reasons for an opinion—not the bare opinion alone. If there is in truth a science (and not merely an individual empiricism), that science must be based on reasons, and these reasons must be capable of being stated and appreciated. Throughout this book may be seen the spirit of candid reasoning and firm insistence on the use of it. I believe that this is the spirit of the future for the judicial attitude towards experts in documents. If judges and lawyers can thoroughly grasp the author’s faith in the value of explicit, rational data for expert opinions, the whole atmosphere of such inquiries will become more healthy. The status of the expert will be properly strengthened, and the processes of a trial will be needfully improved.

“The book abounds in the fascination of solved mysteries and celebrated cases. And it introduces us to the world-wide abundance of learning in this field. French and German investigations are amply drawn upon. Psychology, mathematics, and literature, as well as chemistry, photography and microscopy, are made to serve. The reader arises with a profound respect for the dignity of the science and the multifarious dexterity of the art.”

STREET RAILWAY REPORTS ANNOTATED. Edited by MELVIN BENDER and HAROLD J. HINMAN, of the Albany Bar. Vol. VI. Albany, N. Y. Matthew Bender & Company. 1910.

This series of reports, as is well known, give the electric and street railroad decisions in both the Federal and state courts, and the present volume has an index to the cases and notes of the whole series. It is one of those special publications which, in this day and country, appeal to the busy lawyer who brings a suit for or defends one against a street railroad.

FORMS, RULES AND GENERAL ORDERS IN BANKRUPTCY, collated, revised and annotated by MARSHALL S. HAGAR, of the New York Bar, and THOMAS ALEXANDER, Clerk of the United State District Court for the Southern District of New York, and United States Commissioner. Albany, N. Y. Matthew Bender & Company. 1910.

Certainly a most complete collection of bankruptcy forms are brought together in this volume. More than three hundred are given in a large octavo of over seven hundred pages. The object of the work is to furnish a complete working collection of forms which must be used in bankruptcy proceedings. The work is annotated. The Bankruptcy Act of 1908, including the amendments of 1910, are given in full. The general orders in bankruptcy of the Supreme Court of the United States are set out, and the rules in bankruptcy in the Federal courts of the most important districts are included. The book is well printed in large, clear type, and will be of great assistance to the practitioner in the courts of bankruptcy.

THE FEDERAL PENAL CODE in force January 1, 1910, together with other Statutes having Penal Provisions in force December 1, 1908, annotated by **GEORGE F. TUCKER**, joint author of "Gould and Tucker's Notes on the United States Statutes," and **Charles W. Blood**, of the Boston Bar. Boston: Little, Brown & Company. 1910.

This admirable collection of all the penal provisions of the Federal statutes in force January 1, 1910, will save many a searcher the frequent time that is wasted in looking through numerous indices and volumes of consolidated statutes and session laws. Not only do we find here the whole Federal Penal Code as revised and amended by the Act of March 4, 1909, but in the appendix are set out all the Federal laws having penal provisions not properly separable from the administrative provisions and not contained in the penal code but embraced in the general laws of the United States. It is such provisions as these that would be likely to escape the searcher because they are lost in the mass of general laws.

TRICHOTOMY IN ROMAN LAW.—By **HENRY GOUDY**, D. C. L., Regius Professor of Civil Law in the University of Oxford. Oxford. The Clarendon Press. 1910.

Trichotomy in religion is the division of the human nature into body, soul and spirit; in logic it is the three-fold division of a genus or class. Dr. Goudy's monograph is devoted to showing how in the Roman law the three-fold division was always present.

In modern times, he says, in his introduction, one does not attach any particular significance to numbers as such, outside the realm of mathematics. "One does not at all regard them as influencing actions or events either in public or private life. Least of all have modern writers, if we except perhaps Hegel, been consciously influenced by them in the composition of their writings. What literary or scientific author nowadays, in dividing his treatise into parts, books, etc., or dividing his subject-matter into heads and categories or genera and species, would attach any special importance to what the number of these might be? But in former times it was different; to the ancients certain numbers had a mystical value or fixed traditional force, and ancient writers frequently made the distributions of their subject-matter, as well as the external arrangement of their works, depend upon their accordance with one or other of these numbers. The influence of this symbolism, or whatever it be called, can be demonstrated to have existed, to a greater or less degree, among all ancient nations with whose culture we are acquainted, especially the Hindus, Hebrew, Egyptians, Greeks, and Romans. The numbers 3, 4, 7, and 12 seem to have been above all sacred, but 9 and 10 were also universally symbolic. By the vulgar they were generally regarded as lucky numbers, while philosophers sought a rational basis for them. It is in the last degree improbable, for instance, that the Commandments given to Moses would ever have been published as, say, eight or eleven, or the decemviral code of the Romans in, say, thirteen tables. How far this mysticism of numbers continued to affect mediæval writers or left its impress on mediæval institutions it is not my purpose to inquire. That

it still continued to exercise a certain, though gradually decaying, influence is undoubted. On this point it will suffice to quote a passage from our Lord Coke, a dry but not wholly unimagined writer. Speaking of the English jury, he says, 'It seemeth to me that the law in this case delighteth herself in the number of twelve. For there must be not only 12 jurors for the trial of matters of fact, but 12 judges of ancient time for trial of matters of law in the Exchequer Chamber. . . . And that number of twelve is much respected in holy writ as 12 apostles, 12 stones, 12 tribes, etc.'"

But it is with the number three that the Oxford professor and author is concerned, and he has discovered and discusses in this work no less than nineteen tripartite classifications in the Institutes of Gaius and Justinian, in the Rules of Ulpian, and in the Digest. These are:

1. The precepts or maxims of law—*honeste vivere, alterum non laedere, suum cuique tribuere*.

2. Public law consists—in *sacris, in sacerdotibus, in magistratibus*.

3. Private law is composed of *jus naturale, jus gentium, and jus civile*.

4. All law was either made by consent, or established by necessity, or settled by custom.

5. Praetorian law was introduced by the praetors for the purpose either of assisting, or supplying deficiencies in, or correcting the rigour of the *jus civile*, in the public interest.

6. Constitutions of the emperors, as a source of private law, are *decreto vel edicto vel epistula*.

7. The subject-matter of private law relates either to persons, or to things, or to actions.

8. All law is concerned with either the acquisition, or conservation, or restriction of rights.

9. Persons are grouped into (1) *liberi and servi*, (2) *cives, latini, and peregrini* and (3) *sui juris and alieni juris*.

10. Persons are divided into *liberi, servi, and libertini*.

11. The conditions upon which slaves might acquire *civitas* are three, and the modes of manumission under *jus civile* are also three, viz., *vindicta, censu, and testamento*.

12. Freedman are divided into *cives, latini* and *deditiorum numero*.

13. Persons *alieni juris* are either *in pos estate, in manu, or in mancipio*.

14. Marriages under *jus civile* are contracted *farreo, coemptione* and *usu*.

15. Emancipation and adoption of *filiifamilias* is effected by three mancipations and three manumissions.

16. Of persons *sui juris* it is said: "*quaedam vel in tutela sunt vel in curatione, quaedam neutro jure tenentur*."

17. Tutors are divided into "*legitimi aut senatus consultis constitui aut moribus introducti*."

18. *Status* consists of *libertas, civitas, familia*.

19. *Capitis deminutio* is divided into *maxima, media, and minima*.

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JOHN D. LAWSON,

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“LORD JUSTICE WILLES.”

THE AMERICAN LAW REVIEW.

MARCH-APRIL, 1911.

CRIMINAL PROCEDURE IN ENGLAND.

At the meeting of the National Conference on Criminal Law and Criminology, held under the auspices of the Northwestern University School of Law at Chicago, Illinois, in June, 1909, the following resolution was unanimously adopted:

"Whereas, It is widely asserted and popularly believed that the administration of the criminal law in certain foreign countries is more efficient than in the United States;

"Resolved, That this conference appoint a committee of five persons, preferably jurists, practicing lawyers and students of comparative legal institutions, to inquire into the systems of criminal law and procedure in other countries, particularly Great Britain, with a view to ascertaining in what respect, if any, they are superior to that of the United States, and report whether, in its opinion, the methods which have been adopted abroad for meeting certain of the evils that have developed in American procedure are suitable for adoption in the United States, and whether, with a view to minimizing delays, decreasing miscarriages of justice and strengthening popular confidence in our present agencies for the administration of justice, a more simple, expeditious, certain and inexpensive system of criminal procedure clearly suited to American conditions cannot be devised."

The conference resulted in the formation of the American Institute of Criminal Law and Criminology. The committee called for by the resolution was at once appointed by the president, John H. Wigmore of Chicago, and was composed of the following persons:

Judges Albert C. Barnes and Marcus A. Kavanaugh of the Circuit Court of Chicago, Everett P. Wheeler, Gino C. Speranza of New York, and Frederick Bausman of Seattle, practicing lawyers; Dr. Charles R. Henderson of the University of Chicago, sociologist and penologist; James W. Garner, Professor of Political Science in the University of Illinois and editor of the *Journal of Criminal Law and Criminology*; Roscoe Pound, William E. Mikell, Howard L. Smith and Edwin R. Keedy of the faculties of the Law Schools of Harvard, Pennsylvania, Wisconsin, and Northwestern, and John D. Lawson, Dean of the Law School of the University of Missouri and editor of the *AMERICAN LAW REVIEW*. Mr. Wheeler is the chairman and Professors Pound and Lawson are also members of the committee of fifteen of the American Bar Association to suggest remedies and formulate laws to prevent delay and unnecessary cost of litigation.

Only two members were, however, able to spend the length of time abroad which was required to make a thorough study of the subject. The last two named members of the committee were therefore delegated to represent the whole. Their mission being brought to the notice of President Taft, who has always been a leader in Law Reform, he directed the Secretary of State to instruct the Diplomatic and Consular officers of the United States at London to render the members of the committee such assistance as they were able, consistent with their official duties, that the object of the mission might be accomplished, and the President, himself, gave to the editor of the *AMERICAN LAW REVIEW* a personal letter of introduction to our Ambassador and Consul-General at London. Both Ambassador Reid and Consul-General Griffiths actively interested themselves in the welfare of the two delegates and their endorsement and introductions insured a generous welcome on the part of the English judiciary and the English bar.

Every opportunity was given the committee to see at close hand the workings of criminal procedure in England.

The two delegates were invited to sit on the bench with the judges in every court in London, from the Bow Street Police Court to the Court of Criminal Appeal, and the editor of the *REVIEW* went on circuit in the country with two of the King's Bench Judges.

The committee acknowledges the kindness and courtesy of the members of the English bench and bar on every occasion without exception, and it especially remembers, with gratitude, the good offices of the Lord Chancellor; of the Lord Chief Justice of England; of Mr. Justice Darling, Mr. Justice Bray, Mr. Justice Ridley and Lord Coleridge of the Court of King's Bench; of Lord Gorell of the Judicial Committee of the Privy Council; of Lord Justice Kennedy of the Court of Appeal; of Sir Samuel Evans, the President of the Divorce Division of the High Court; of Sir Forest Fulton, the Recorder and Sir Frederick Bosanquet, the Common Serjeant of the City of London; of Judge Wallace, K. C., of the London Sessions; of Sir Charles Mathews, the Director of Public Prosecutions, and Magistrate Marsham of the Bow Street Police Court; of Lord Algernon Percy, High Sheriff of Warwickshire; and of R. B. D. Acland, K. C.; M. A. Buszard, K. C.; and J. Arthur Barrett, Esq., of the English Bar; and of Sheriffs Slazenger and Tippetts, of the City of London.

The report opens with a description of the criminal jurisdiction which is vested, it says, in six tribunals, and the appellate jurisdiction in two, as follows:

1. *The House of Lords.*

This Court has exclusive jurisdiction in cases of impeachment, and where a peer indicted for felony or treason claims the right to be tried by his peers.¹

2. *The King's Bench Division.*

The original jurisdiction of this Court, which extends over all indictable offenses, is seldom exercised except in proceedings upon information. Indictments may in special cases be removed by writ of *certiorari* into the King's Bench Division from an inferior court.

¹ Also the House of Lords is given by the act creating the Court of Criminal Appeal, appellate jurisdiction from that Court. See *post*, p. 185.

3. *The Assize Courts.*

Most indictable offenses are tried in the Courts of Assize and quarter sessions. Judges of the High Court, acting under commissions of oyer and terminer, and gaol delivery, sit at the assizes, which are held in certain of the larger towns and cities, composing circuits. There are eight circuits and the assizes are held four times a year. The arrival of the judge in an assize town is an occasion of great importance, and the court is opened with much ceremony. The judge in his red robe is accompanied upon the bench by the High Sheriff of the county, and often by the Lord Mayor and Aldermen of the city. It is believed that these ceremonies foster a respect for the law and the courts.

In certain cases, when a judge is unable to go on circuit, a King's counsel is appointed special commissioner to sit at the assizes. He has not the right to wear the red robe, but sits in a black gown. It is said to be a source of much disappointment to the prisoners when a King's counsel presides at the assizes, as they consider it their lawful privilege to be tried by the "red judge."

4. *The Quarter Sessions and Recorders.*

The quarter sessions, which have jurisdiction over the lesser indictable offenses, are held four times a year in the counties and borough towns. In the county sessions the justices of the peace act as judges. There must be two or more justices on the bench at each sitting of the court. The justices elect one of their number chairman. He is the presiding officer, and sums up the evidence to the jury. In the borough sessions, the Recorder of the borough is judge.

Unlike the American Justice of the Peace, who is a petty judicial officer, elected generally for a short term and with power to try civil cases, as well as minor criminal offences and also to commit for trial, the English Justice of the Peace takes high rank both in society and in legal administration. He need not be a lawyer but he is usually a man of standing in the community. He has no jurisdiction in ordinary civil causes but hears and determines minor offences, and in serious ones commits for trial at the Quarter Sessions or the Assizes; he has also jurisdiction in bastardy cases,

disputes between employers and workmen, claims for poor rates, disputes as to making of roads and the repairs of sewers, granting or withholding of licenses for the sale of intoxicating liquors, school attendance, vaccination orders, orders for the separation of husbands and wives on the ground of cruelty, and the like. The justices are assisted, so far as the legal aspect of their duties is concerned, by a clerk to the justices, who must be a lawyer of five years' standing. Every hearing before them must

take place in public, and in open court. At this hearing the accused is entitled to be represented by counsel or solicitor, may put such questions to the witnesses called against him as he thinks fit, may give evidence on his own behalf, or may make such statement in mitigation as he desires. After the case has been heard, unless, from its gravity, it is one of those which are bound to be sent for trial to the assizes, the justices, if they are satisfied that the offense was committed by the accused, may convict, and either fine, send to prison or bind over the prisoner to be of good behavior for a certain period. If the offense is one which the prisoner has the option of having dealt with summarily or sent for trial to the assizes, and the prisoner elects to go to trial by a jury, the chairman of the magistrates, before allowing him to make any statement, is bound to read to him the following: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you at your trial." If the complaint is in respect of an indictable offense, and the prisoner be sent for trial as above indicated, then the procedure, so far as its essence is concerned, in bringing the prisoner to trial before a jury, is the same as in a trial at the assizes. In the borough towns, the work of the justices is performed by the Recorder. He is a member of the bar, of high standing, usually a King's counsel, residing in London. His judicial duties (except in the case of the Recorder of London), do not withdraw him from practice and, when not sitting as Recorder in his borough, he may be leading a case, either for the prosecution or defense, in the London Criminal Court or on circuit. In the great County of London the magistrates sit in two divisions and are presided over by two permanent and paid chairmen who have all the qualifications of King's Bench judges.

5. *The Central Criminal Court.*

This court was established by act of Parliament in 1834, and took the place of sessions held at the Old Bailey. The jurisdiction of the court extends over all indictable offenses committed within the city and county of London, the county of Middlesex and parts of adjoining counties. The whole area constitutes an artificial county for purposes of venue. In practice the judges of the Central Criminal Court are a judge of the High Court, the Recorder of London, the Common Serjeant, and one or both of the judges of the City of London Court.

6. *The Petty Sessions and Police Magistrates.*

The courts of petty sessions are composed of justices of the peace. They may exercise a summary jurisdiction, or may commit an accused to trial at the assizes or quarter sessions. In the larger towns and cities specially appointed police magistrates have a similar jurisdiction.

The Appellate Procedure in England is vested in:

1. *The Quarter Sessions.*

Appeals lie in certain cases, specifically named by statute, from the courts of summary jurisdiction (the petty sessions and police magistrates).

to the quarter sessions, where the justices of the peace sit in banc. Upon the hearing, either party to the appeal may call evidence which was not given at the trial. The decision of the justices upon the appeal is final unless they state a case for the decision of the High Court.

2. *The Court of Criminal Appeal.*

II.

THE JUDICIAL FORCE AND SALARIES.

The committee points out that a mistake is frequently made by American writers (in comparing the English with the American judicial force) by assuming that the sixteen, now eighteen,² judges of the Court of King's Bench are the only judges trying indictable offences. As a matter of fact it finds that the criminal judges of England are the eighteen King's Bench judges, about sixty recorders in the cities and larger towns, the justices of the peace in the counties, who form the Quarter Sessions, and in London the recorder, the common serjeant and two city judges.

But the judges (not the justices) try civil cases as well, English sentiment being against purely criminal judges. Men who try criminal cases only, it is thought are apt to lean too strongly either for or against the accused.

Comparing the salaries of the English judiciary with what we pay our judges, the committee finds that the Chief Justice of England receives \$40,000 a year, the judges of the King's Bench \$25,000, the recorder of London \$20,000, the common serjeant, \$15,000, the commissioners and the chairman of the London sessions \$10,000 each. Even a London police magistrate receives \$7,500 a year. It is not surprising to find that the bench in England is filled by the best talent the country can produce, and it costs England proportionately less than it costs the United States because of the smaller judicial force and the large number of men who

²Through a misprint in the Report the number of judges of the King's Bench appears as 20 instead of 18.

serve without pay. In this class are included all the magistrates of all the counties of England who are paid nothing, but who accept the labor and the responsibility of the office on account of its dignity and out of public spirit.

III.

BAIL.

Though there is no limitation in the right to grant bail in criminal cases, such as some of our state constitutions contain—"All offenses shall be bailable except *murder in the first degree where the proof is evident and the presumption great*"—it being a matter of discretion for the court, yet it is rarely granted in cases of felony. In very minor cases where the accused person is arrested and taken to the police station, the inspector in charge will usually let him go free until he can be brought before the magistrates, if his address can be verified and he seems respectable and likely to come up when wanted.

IV.

STARTING THE PROSECUTION.

The prosecution is started either by arrest or summons. The law as to arrest with and without warrant is about the same in England as with us.

The summons is used largely in offences not involving any serious consequences, when it is not likely that the accused will endeavor to escape. If the summons to attend the court and answer the criminal charge is not obeyed, the warrant is then issued. A warrant must never be issued for the arrest of a person whose attendance can be secured by summons. In a case heard by the committee at the Old Bailey, where a shop-keeper was on trial for receiving stolen property, it appeared that he had been arrested upon a warrant. The judge inquired particularly why a warrant was issued, criticised the policeman for making the arrest and said that a summons would have been sufficient.

In short, the English idea of personal liberty does not permit the arrest of a person unless it is necessary to secure his attendance to answer the criminal charge. The despotic power of arrest given to the police in the United States—and Russia—is unknown in Great Britain.

After the commitment by the magistrate the proceedings are continued by information, indictment, or coroner's inquisition. An information lies only for a misdemeanor of a public kind, as for example, a seditious libel. All other offences must be tried on indictment. The verdict of a coroner's jury charging murder or manslaughter, has the same effect as an indictment.

Where an indictment and a coroner's inquisition co-exist against an accused person for the same offence there is no rule which precludes the giving of him in charge to a jury upon both the indictment and the inquisition simultaneously, and in practice at the Central Criminal Court in London this is generally done.

V.

DEFECTS IN INDICTMENT.

This subject which plays so important a part in our criminal appeals and which is the ground for so many reversals in our courts is practically unheard of in England. In the olden days it was common, and our hair-splitting rules in regard to what an indictment should contain are taken from the ancient English law. But an English barrister who should set up such an objection to an indictment, as our criminal lawyers do every day, would be told by the judge, as Pollock, C. B., told a technical counsel half a century ago, "Your point has nothing in it, though it is likely that a hundred years ago you might have succeeded."

There is really no use in an English lawyer of today relying upon a defect in an indictment to help him out, for in the first place the indictments are brief and without any technical words; in the second place every objection to an

indictment must be made by a motion to quash or demurrer before the jury is sworn; and in the third place the court will always amend the indictment to make it fit the case.

To illustrate the difference between an American and English indictment, here is an example of an indictment for murder in most of the states:

STATE OF M.

COUNTY OF A.

IN THE A.CIRCUIT COURT.

AUGUST TERM, A. D., 1905.

The grand jurors for the State of M., impaneled, sworn and charged to inquire within and for the body of the County of A. and State aforesaid upon their oath present and charge:

"That G. W. and C. W., late of the County of A., and State of Missouri, on the 16th day of January, 1904, at the County of A. and State of Missouri, did then and there, in and upon the body of one E. P., then and there being unlawfully, willfully, feloniously, premeditatedly, on purpose, and of malice aforethought make an assault, and with a certain dangerous and deadly weapon, to-wit, a club, which said club was then and there of the length of four feet, of the breadth of two inches, and of the weight of ten pounds, and which said club the said G. W. and C. W. then and there in hands had and held, the said G. W. and C. W. did then and there unlawfully, willfully, feloniously, premeditatedly, on purpose, and of their malice aforethought strike and beat him, the said E. P., and at and upon the right side of the head of him, the said E. P., with the club aforesaid, and inflicting on and giving to him, the said E. P., in and upon the right side of the head of him, the said E. P., one mortal wound, which said mortal wound was of the length of four inches and of the breadth of two inches, of which said mortal wound the said E. P., from said 16th day of January, 1904, the year aforesaid, in the county aforesaid, until the 18th day of January, in the year aforesaid, in the county aforesaid, did languish, and languishing, did live, on which said 18th day of January, in the year aforesaid, the said E. P., in the county and state aforesaid, of the mortal wound aforesaid, died; and so the grand jurors aforesaid upon their official oath as aforesaid, doth say that the said G. W. and C. W., him the said E. P., in the manner and by the means aforesaid, willfully, unlawfully, feloniously, premeditatedly, on purpose, and of malice aforethought did kill and murder, against the peace and dignity of the state."

This is almost exactly in the form of the English indictment in the first three periods of English history from the days of the Normans to the days of Victoria. But today here is the form used in England:

"The jurors for our Lord, the King, upon their oath present that G. W. and C. W. on January 16, 1904, feloniously, willfully, and of their malice

aforethought did kill and murder one E. P., against the peace of our Lord, the King, his Crown and Dignity."

The joke in this kind of technical and long-drawn out phraseology is that after long argument over the indictment just set out the court reversed the conviction and ordered a new trial on the ground that the document did not sufficiently show whether the mortal blow was inflicted with a club.^{2a}

VI.

THE PROSECUTOR.

There are no such officers in England as our prosecuting attorneys. Prosecutions are begun and carried through by either (1) a private person called the "prosecutor," usually the sufferer by the criminal act, (2) the police, or (3) the director of public prosecutions.

(1) The private prosecutor begins the prosecution and employs counsel to conduct it. At the trial he has no standing other than that of a witness and is not permitted to take part in the conduct of the case. His costs are provided for by statute, and his duty ends with the conviction or acquittal of the prisoner.

(2) If the complainant is poor or is unwilling to prosecute or if there is no complainant but the police, then the police carry on the prosecution with counsel supplied by the Crown.

(3) The director of public prosecutions is an official appointed by the government, whose duty it is, under the superintendence of the attorney-general, to institute or carry on criminal proceedings in cases which appear to him to be of importance or advise persons concerned in such proceedings; and to appear for the Crown in criminal appeals.

The consent of the director of public prosecutions is required in prosecutions for incest, and for being an habitual criminal.

VII.

THE JURY.

The members of the jury panel are summoned by the sheriff from a list of qualified persons furnished to the clerk of the county by the churchwardens and overseers of the poor of the several parishes and townships.

The qualifications are ownership of real estate or that he is a householder paying a certain rental.

The grounds of disqualification are (1) *propter honoris*

^{2a} State v. Woodward, 191 Mo. 167.

respectum, i. e., that he is a peer or lord of Parliament; (2) *propter defectum*, i. e., that he is personally deficient, as an infant, alien, lunatic; (3) *propter delictum*, i. e., that he is an outlaw or convict; (4) *propter affectum*, i. e., that he is biased on account of words, relationship or employment. But a man is not considered as having a bias simply because he may have expressed an opinion on the facts of the case as he has heard them from others or read them in newspapers.

Challenges of a juror are very rare. The committee in all the cases it saw tried in nearly three months in London and the country, did not witness a single challenge.

Nevertheless the law of England recognizes the right of challenge. In felonies the accused has twenty peremptory challenges, but the Crown has none. If the Crown objects to a certain juror the court orders him to stand aside until the panel has been exhausted or a jury obtained. Then, on the panel being called over, if the jury box is not filled, the Crown must challenge for cause only. There is no peremptory challenge in misdemeanors.

Challenges for cause are unlimited, the causes being the four mentioned above. But where our practice and the English practice is so wide apart is in the matter of the examination of the juror. While the English law permits a question to be put to a juror to show that he is incompetent *propter delictum* or *propter defectum*, the question must be based on a previous challenge, naming the ground and based on evidence; neither the Crown nor the defense is permitted to go on a fishing expedition in the hope of discovering from the juror's answers some ground which they had no previous evidence to support. And a challenge *propter affectum*, i. e., that the juror is not indifferent, but is biased, must be proved by evidence *aliunde*; it is not allowable to ask a juryman whether he has an opinion or has expressed one. The counsel must challenge the juror he objects to, must state the ground of bias and must then produce his witnesses in support of his charge; and the question is decided not by the Court, but by triers.

The examination of the juror on the *voir dire*, so familiar in our courts was never witnessed. The practice is for the counsel to agree beforehand that a juror or jurors they object to shall not be called, the clerk is notified and does not call him; and if on arraignment the prisoner objects to one or more of the jurymen, the court promptly orders them to leave the box and others take their places.

The committee is of the opinion that one reason which plays a great part in the confidence of court and counsel in the fairness of the men called as jurors is the influence of the courts upon the press and the authority which they exercise in preventing the newspapers from prejudging a pending case. From the day the prosecution is begun until the jury renders its verdict, a newspaper is not permitted to comment upon the evidence or express opinions upon the guilt or innocence of the prisoner. Anything beyond a fair report of the evidence, as it is given in the magistrates' or the trial court, is forbidden. For a newspaper to publish a comment upon pending judicial proceedings, either criminal or civil, which comment would be likely to influence the minds of persons who might become jurors, is a contempt of court and is severely punished. Examples of this, in recent cases have been referred to in a former issue of the REVIEW.³

VIII.

ATTITUDE OF COUNSEL FOR PROSECUTION.

It has already been pointed out that prosecutions in England are of two kinds, public and private. In a public prosecution the government retains a barrister to act in that particular case. All the public prosecutions during a term of court may be conducted by different counsel, and it often happens that at a single term of court the same barrister may represent the Crown in some cases and the defense in others.

In public prosecutions counsel for the Crown is not a partisan whose sole aim is to convict. His function is to conduct an investigation to determine the guilt or innocence of the accused. In opening the case for the prosecution counsel generally states the circumstances favorable to the prisoner, as well as those tending to show his guilt. He also warns the jury of points of weakness in the prosecution's case; for instance, that the testimony of a certain witness is open to suspicion. In cases where the prisoner's mental or physical condition is material, counsel for the Crown puts the prison doctor on the stand, and his testimony may dispose of the case in the prisoner's favor. If the prisoner has made a statement before the magistrate, this is read to the jury at the close of the evidence for the Crown as part of the prosecution's case. In some instances, when justice seemed to demand it, questions favorable to the prisoner were put to witnesses by counsel for the Crown. In the trial of *Rex v. Kusserow*

³ See Vol. 44 Am. Law Rev., p. 941.

(Central Criminal Court, July 19), where it seemed that the prosecuting witness was not telling a true story, counsel for the Crown examined the other witnesses in favor of the prisoner, asking several questions as to hearsay, for which he excused himself to the judge on the ground that he was doing it on behalf of the prisoner. In some cases where the prisoner pleaded guilty counsel for the Crown told of extenuating circumstances. The non-partisan attitude of the prosecution is more marked where the prisoner is undefended.

It is provided by statute that in certain cases counsel for the prosecution must give notice to the defendant of matters that will be proved at the trial. Thus, on an indictment for an offense for which drunkenness is a contributing cause, where the prosecution intends to prove that the defendant is an habitual drunkard, "unless evidence that the offender is an habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the court by which the defendant is to be tried, and to the offender, that it is intended to charge habitual drunkenness in the indictment."

Upon an indictment for receiving stolen goods, where the prosecution intends to introduce evidence of previous convictions of similar offenses for the purpose of proving that in the case on trial the defendant had guilty knowledge, seven days' notice in writing must be given to the defendant that it is intended to introduce evidence of the previous convictions. Where the prosecution calls witnesses whose depositions were not taken before the trial and whose names are not upon the back of the indictment, notice of intention to call such witnesses, with a copy of their evidence, should be given to the defendant and also to the trial court.

Where the prosecution intends to introduce evidence, in accordance with the Prevention of Crimes Act, 1871, of a conviction for fraud or dishonesty, not less than seven days' notice must be given to the defendant.

Counsel for the prosecution has the right to sum up the evidence to the jury except in cases where the prisoner is undefended and has been the only witness in his own behalf. This right is seldom exercised, especially where the evidence for the defense is only as to character. In general it may be said that counsel for the Crown sums up his case only where erroneous statements have been made which he wishes to correct, or when he desires to explain apparent contradictions in the testimony. In exercising his right to sum up the evidence, counsel for the Crown is forbidden by act of Parliament to comment upon the failure of the prisoner, or the wife or husband of the prisoner, to testify. When the prisoner is undefended counsel for the Crown very rarely sums up the evidence.

Counsel for the Crown defers very much to the judge. Sometimes during the trial the judge is consulted regarding the order in which the witnesses for the prosecution are to be called, and is even asked if further evidence need be introduced.

Counsel for a private prosecutor is more of a partisan than counsel for the Crown in a public prosecution, but can prejudice his case with judge and jury by a display of too much partisanship.

Later information from an authoritative source shows that the statement above, "when the prisoner is undefended, counsel for the Crown very rarely sums up the evidence," is not quite accurate. It seems that when the prisoner is undefended counsel for the crown has no right to sum up the evidence and even when an undefended prisoner calls witnesses in his behalf, counsel for the Crown only exercises his right of reply when the interests of the case demand it.

IX.

ATTITUDE OF COUNSEL FOR DEFENSE.

The attitude of counsel for the defense generally appears to be that of one who is endeavoring to bring out facts tending to disprove his client's guilt, rather than to confuse the issue so as to make a decision difficult, or to get error on the record which may be the basis of an appeal. This attitude is due to at least two causes—one of which is the high standard of the profession; the other is the careful supervision by the judge of the proceedings of the trial.

Counsel for the prisoner is allowed and generally takes more latitude than counsel for the Crown, in the examination and cross-examination of witnesses, and in his remarks to the jury. He makes more frequent objections to the questions of opposing counsel. He is sometimes permitted to excuse the putting of questions otherwise objectionable on the ground that the case is an important and serious one. Thus, in one case counsel for the prisoner, who was asking a witness questions on collateral matters, when cautioned by the judge, replied: "It is a very important case and I am sure your Lordship will give me every possible latitude." Counsel for defense likewise has considerable freedom in summing up his case. "In summing up the evidence for the defense, the prisoner's counsel is not to be restricted merely to remarks on the evidence of his witnesses, but if anything occurs to him, which it is desirable to say on the whole case, he is at liberty to say it." The extent to which the prisoner's counsel is allowed a privilege not enjoyed by counsel for the Crown varies with the particular trial judge. There is also the following formal limitation: "In the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." (Resolution of Judges, November 26, 1881.) Counsel for the defense is permitted to cross-examine the prosecution's witnesses by suggesting to them, as true, facts which are inconsistent with the testimony of those witnesses, but which have not appeared in evidence.

X.

GENERAL COMMENTS ON COUNSEL.

In the trial of a criminal case in England there are comparatively few objections made to the questions of opposing counsel. This is due to two reasons; first, counsel does not endeavor to get before the jury inadmissible evidence by suggesting it in the form of a question; second, the opposing counsel does not generally object to questions which are only technically improper, if the merits of the case will not be thereby affected.

The practice of counsel is not invariably in accord with the above statement, but depends somewhat upon the temperament of opposing counsel, and the personal attitude of the trial judge. In one case there were many objections and much wrangling by counsel. In another case counsel for both sides indulged in considerable levity. Such cases, however, are rare exceptions.

The division of English lawyers into two classes, viz., barristers and solicitors, affects in some degree the proceedings in the trial of criminal cases. One advantageous feature of this division is that counsel are trained advocates, whose experience is confined to the trying of cases. They are specialists in this art, and are enabled to reach a high degree of efficiency. The traditions of this branch of the profession have influence in securing the proper trial of cases.

The division of the bar has also certain disadvantageous and unsatisfactory features. Counsel for the prisoner, for instance, receives his instructions from the solicitor, and very seldom has any communication with the prisoner himself. In many cases counsel has not consulted with the witnesses, and knows nothing of their personal characteristics before they appear on the witness stand.* Although the solicitor may endeavor to inform counsel fully, many points arise in the course of the trial on which counsel has not been instructed. The prisoner and his counsel cannot communicate directly with each other during the trial, but must do so through the solicitor. It appears rather awkward, at least to one not accustomed to such procedure, to see the trial of a case interrupted while counsel leans over and puts a question to the solicitor, who goes to the dock and consults with the prisoner, and then returns with an answer to counsel.

In the Court of Criminal Appeal a number of cases were observed by us in which the counsel who argued the appeal had not represented the prisoner at the trial. In one of these cases the judges asked counsel several questions regarding certain facts of the case. To some of these

* The fact seems to be that it is against the rule of the English bar, and considered an impropriety in counsel, to see or consult with any

witnesses to fact in a criminal case before the trial. Experts do not come within the description of the witnesses to fact.

he replied, "I do not know, as I did not try the case." To others he said, "I do not know, as I have not been instructed on that point."

Another feature of the division of the bar is that it involves the paying of a double fee by the client. It must be added, however, that this double fee is generally less than a single fee for the same services in the United States.

XI.

THE POWERS AND ATTITUDE OF THE JUDGE.

The presiding judge takes a very active part in the trial of criminal cases in England. He directs the proceedings at every stage, and is the active, controlling power throughout the trial.

In cases where counsel for the Crown states that he believes the evidence for the prosecution will not justify a conviction and therefore proposes not to call any witnesses, the judge insists on knowing the grounds for such belief, and will not permit the prosecutor to take this course, unless convinced that the ends of justice will be thereby served. The same is true where counsel for the Crown states he is willing to accept a plea of guilty to one count of an indictment and not to proceed on the others.

If the judge is of the opinion, at any stage of the proceedings, that upon the evidence presented the jury should not convict, he may stop the case and direct the jury to return a verdict of not guilty. In one case the judge told the jury he was of the opinion, on certain facts in the prosecution's case, that the guilt of the prisoner could not be established, and that the prisoner should be acquitted. The foreman of the jury replied that the jury took a different view of the facts in question and would like to hear more evidence. The judge then said that if a verdict of guilty should be brought in he would set it aside, whereupon the jury found the prisoner not guilty. In such a case it may be questioned whether the judge is not usurping the functions of the jurors, who are often in a better position to draw conclusions from facts of conduct than the judge.

Where there are several counts to an indictment the judge may rule at the close of the prosecution's case that the evidence presented will not support a conviction on certain counts. The jury is then told to confine its attention to the remaining count or counts.

The judge of his own initiative may call and examine witnesses who are not put on the stand for the prosecution or defense, and it lies in the discretion of the judge whether he will permit these witnesses to be cross-examined by either counsel.

During the examination of witnesses by counsel the judge often puts questions to the witnesses. This may be for the purpose of having a previous answer explained, or to bring out facts which were not shown during examination by counsel. In some of the cases heard, after a witness had been examined and cross-examined by counsel, the judge questioned the witness regarding the matters testified to. If the judge believes a witness became confused during cross-examination, he will likely put questions to the witness for the purpose of clarifying the answers given.

The judge controls strictly the conduct of counsel throughout the trial. Counsel are compelled to confine themselves to relevant and proper questions and are often required to explain why certain questions are put to the witnesses. In several cases the judge interrupted so frequently that counsel did not have the opportunity to develop his case in an orderly manner. In other cases during the examination of a witness by counsel the judge put questions to the witness, which counsel stated he intended to ask later. The evidence in most cases was introduced according to the view of the judge rather than that of counsel. Counsel were sometimes advised by the court regarding the order in which the witnesses were to be called, and were also told that it was not necessary to question certain witnesses who were called.

The English judge takes judicial notice of many matters which would have to be proved in our courts. Thus one judge said he would take notice without proof that in the Catholic Church throughout the world it is customary to baptize infants a few days after birth. Another judge took judicial notice of the fact that it is customary in English music-halls for the singers to invite the audience to join in the chorus.

The judge takes long-hand notes of the evidence, often writing down the testimony of witnesses *verbatim*. These notes form the basis for the judge's summing up and also during the trial seem to form the official record of the proceedings. If there is any dispute regarding a matter already given in evidence it is customary to have recourse to the judge's notes rather than to those of the shorthand writer. Much time is required in the making of these notes and a witness is often stopped in the midst of an answer to enable the judge to write down what has already been said. As most trials do not last an entire day, these notes are of more available use to the judge than a copy of the shorthand notes could be, because he can now sum up the evidence as soon as counsel have spoken to the jury. This he could not do if he were obliged to wait till a transcript of the shorthand notes was made.

Some instances were observed of the exercise by the judge of a broader prerogative than was the general rule. In certain cases the judge expressed a forcible opinion on matters collateral to the issue of the trial. Thus one judge, after sentencing a defendant who had pleaded guilty to wounding his paramour, delivered a homily on illicit relationships. Certain judges during the trial expressed their opinions regarding the witness's testimony and even paraphrased several answers so as to color the meaning. In the trial of a prisoner for murder, when the defense was insanity, a witness for the defense testified that the prisoner had on several occasions struck persons without provocation and had written a letter in which he stated he had set fire to his father's house in the hope that his father and step-mother would be burned to death. The judge then said, "He was about as evil a boy as you could meet, was he not?" The effect of a number of cross-examinations was weakened by the judge restating the answer of the witness given in direct examination, or by saying to the jury there was no weight to the point made by counsel who was cross-examining.

XII.

SUMMING UP BY TRIAL JUDGE.

After counsel have addressed the jury the judge reviews the evidence in detail, and directs the jury as to the law governing the facts. In this summing up the judge generally expresses his opinion regarding the weight and importance of the evidence. The judge in summing up may also comment on the character and demeanor of the witnesses. Where an indictment permits conviction of an offense of different grades the judge indicates to the jury the degree of the offense warranted by the evidence. It is the duty of the judge to warn the jury as to the effect of particular evidence in certain cases. Thus, he must tell the jury it cannot convict on the uncorroborated evidence of an accomplice. It is the duty of the judge to explain to the jury the effect of a unsworn statement made by the prisoner to the jury. A judge may, in summing up, comment on the failure of the accused to give evidence on oath; and if the accused does give evidence, may comment upon his evidence.

The judge, in his summing up, generally endeavors to reduce the case to an issue and to call the attention of the jury to the parts of the evidence that are material in deciding this issue, leaving the jury free to determine the verdict. Most of the summings-up heard were of this character.

In a few instances, however, the judge did not confine himself to the limits just indicated, but expressed a strong opinion regarding the guilt or innocence of the prisoner. In fact, in several cases observed by us, the judge practically directed a verdict of guilty, or not guilty. In the trial of an indictment for attempted murder where the defense claimed the injury was due to an accident, the judge did not leave to the jury the alternative of acquitting, but said the question for them to decide was whether the prisoner had the intent to kill or merely to inflict serious bodily harm. In another case where the same offense was charged, the judge in plain terms told the jury to find the defendant guilty of wounding with intent to inflict serious bodily harm. In the trial of a defendant for murder, where the defense was insanity, the judge said to the jury, "You can do nothing else but find a verdict that the prisoner was guilty of the act, but not responsible."

This right to advise the jury has always been regarded as a very important function of an English judge. Hale, in his *History of the Common Law* (Chap. 12), "touching trial by jury" says, "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them, and also, in

matters of fact, to give them great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen."

The common law system of trial by jury was one of exact balances and demanded a free and fearless judge as well as a free and fearless jury. The jury may draw the car of justice but the judge must drive or before long they will drag it to destruction.⁵

Modern American legislation has shorn the trial judge of most of his common law powers and with an unlimited right of appeal from any of his rulings, his real position in most of the states is not far above that of a bailiff to preserve order and direct the proceedings.

By the constitution of several states and by the statutes of many more the most important function of a trial judge is taken away, viz., his duty to weigh evidence, to comment on the character and clearness of the witnesses and to indicate to the jury his opinion as to the weight and value of the evidence.

These modern laws prohibit the judge from charging juries on matters of fact, or commenting at all upon them. In some states all the instructions to the jury must be in writing and in others the judge is required to give or refuse the instructions presented by counsel without modification.⁶

This popular distrust of the independence and intelligence of the trial court does not seem to exist in any other civilized country and is, in the opinion of one of our greatest jurists and public men, one of the degrading effects of the American plan of an elective judiciary;⁷ for the Federal courts, where the judges are appointed for life, are not subject to this criticism.

In the July-August number of this REVIEW we expect to publish a full report of a late English murder trial (R.

⁵ Baldwin Mod. Pol. Inst., 250.

⁶ See *post*, Current Topics.

⁷ Baldwin, *Id.* 254.

v. Dickman, June, 1910) as a striking example of English criminal procedure in a capital case from the trial to the execution and as an illustration of what an English charge to the jury is, and of the relation that an English judge bears to the determination of the guilt or innocence of an accused person.

XIII.

LEGAL AID.

The judge may and in serious cases will appoint a barrister, without pay, to defend a prisoner who is without counsel. But not in every case as with us. The committee witnessed many trials in which the prisoner was without counsel and defended himself. But it should not be forgotten that in England the judge still remains in theory what he was before the statutes allowing counsel in cases of felony were passed, viz.: counsel for the prisoner. In several cases, which the committee heard, where the prisoner was not represented by counsel, the judge cross-examined the prosecution's witnesses, and in summing up to the jury brought out strongly the points in favor of the prisoner. In the case of one judge who presided at several trials, it seemed that the prisoner could not have been better defended had he been able to employ counsel.

By a recent statute (1903) it is provided that where it appears, having regard to the nature of the defense set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defense, and that his means are insufficient to enable him to obtain such aid the committing magistrates or the judge of assize, may order that he shall have counsel assigned to him to be paid by the state. But in order that this shall be granted the prisoner must disclose his full defense at the examination so that the court may decree whether it is in the interest of justice that he be granted

legal aid. In charging the grand jury just after the act came in force the Lord Chief Justice said:

“The act was not intended to give a person legal assistance in order to find out if he had got a defense. He was not to have solicitor or counsel assigned to him for such a purpose. The governing principle of the act was that people who had a defense should have every inducement to tell the truth about it at the earliest opportunity. . . . The act was passed in the interests of innocent persons, and such would be advised in future not to reserve their defense but to disclose it at once, so that it could be investigated.”

This illustrates the English idea that the case if possible should be fully tried by the first tribunal before which it comes. Therefore the preliminary examination is really a trial, and the magistrate does not commit unless the evidence presumably justifies a conviction. For a prisoner to reserve his defense is unusual and works against him on his trial on the indictment. On a number of occasions various judges of the Court of Criminal Appeal expressed strong disapproval, when it appeared that the appellant did not set forth his defense before the magistrate, but reserved it till the trial. In *Rex v. McNair* (1909, 2 Cr. App. Cas. 2, 4), the Lord Chief Justice said: “If a prisoner is ill-advised enough to say at the Police Court that he will reserve his defense, thereby making it impossible for his story to be investigated before trial, it is no ground upon which we can interfere with the verdict. For an innocent man, the sooner his defense is raised the better.” Again, in *Rex v. Maxwell* (1909, 2 Crim. App. Cas. 28, 29), the Lord Chief Justice said: “The jury were entitled to consider adversely to appellant his silence at the Police Court, and the fact that he reserved his defense.”

One objection made to the creation of the Court of Criminal Appeal was that as the law then stood, a person had two trials and one appeal, the committal of the magistrate was one trial, the indictment another, and the trial in the Assize Court a new trial on appeal.

XIV.

PRISONER AT TRIAL.

Before the Criminal Evidence Act of 1898 (61 & 62 Vict., c. 36), a prisoner could not take the stand in his own behalf, but could make an unsworn statement to the jury from the dock. This Act reserved the privilege of making an unsworn statement, and gave the right to testify under oath. In practice, when the prisoner does not wish to testify under oath, a copy of his statement made before the committing magistrate is generally read to the jury. An undefended prisoner may cross-examine the prosecution's witnesses, and may call and examine witnesses in his defense. He may also address the jury.

XV.

FUNCTIONS OF POLICE.

The police play a very important part in criminal trials and render valuable aid in the administration of justice, in addition to the arrest and preliminary questioning of accused persons. It is one of the duties of the police to summon as witnesses at the trial all persons who know anything about the facts of the case. Some of those summoned in this way may testify for the prosecution and others for the defense. Such practice on the part of the police is often of great advantage to a prisoner in the defense of his case, as witnesses of whom he knew nothing may be thus brought to testify in his favor.

Before the trial of a prisoner the police make careful investigation regarding his reputation and record. The results of these investigations are in some cases put in evidence at the trial, and may materially affect the verdict. After every conviction and before sentence the police report to the judge full details of the prisoner's reputation and criminal record.

Much importance is attached to the testimony of the police. The fact that a witness is a police officer adds weight to his testimony. It is to be regretted that the reverse is often true in this country, where the testimony of the police is often viewed with suspicion by our juries, who hesitate to convict unless the testimony is corroborated by other witnesses.

XVI.

THE JURY AND THEIR VERDICT.

The manner of impanelling and the personnel of the jury have already been discussed. During the trial the jurors are very attentive and follow carefully the proceedings of the case. They sometimes ask that the answer of a witness be repeated, and even suggest that certain questions be put to witnesses.

The judge in summing up expresses his opinion of the evidence, and this is usually followed by the jury. If results from this that in most cases the jurors do not leave the jury box but render their verdict after a short consultation in the box. If the jury is convinced, at the close of the prosecution's case, or at any time during the presenting of evidence for the defense, that the prisoner is not guilty, the foreman stops the case and pronounces a verdict of acquittal. One particular jury attempted in an amusing way to exercise this power of rendering a verdict before the completion of the testimony. Before all the evidence for the prosecution had been presented, the foreman of the jury announced to the judge that it was not necessary to call any further witnesses as the jury was convinced that the prisoner was guilty. The jurors seemed disappointed when the judge told them they would have to hear the prisoner's story.

Where the defense is insanity the verdict of the jury is "guilty" or "guilty, but insane." In the latter case the judge sentences the prisoner to be detained during his Majesty's pleasure.

XVII.

EXPEDITION.

Expedition in the bringing of a prisoner to trial and in disposing of the case is very marked in English procedure, a very short time elapsing between the committal of the prisoner and his trial. There is no putting a case off from term to term by continuances, as is the American practice. "How long will you be here," asked one of the committee, of a judge of assize of a provincial city. "Until every prisoner in the jail is tried," was the reply. This was what was meant by his commission of "oyer and terminer and general jail delivery." And as there are practically no challenges to jurors and as the judge exercises active control over the procedure, there is no waste of time during the trial. Most of those the committee witnessed were concluded in a few hours, though one capital case required a couple of days.

And from the trial court to the end of the case in the Court of Appeal the judicial machine works with a rapidity rather startling to an American practitioner. One member of the committee sat with the judges of the Court of Criminal Appeal one Monday in July last. There were fifteen

cases to be heard, no conviction older than three weeks, and when the court rose at five o'clock that afternoon every one of these appeals had been heard and final judgment in them delivered.

In the celebrated Crippen case the Court of Appeal heard and decided the prisoner's appeal in less than two weeks after the conviction.

XVIII.

THE COURT OF CRIMINAL APPEAL.

History of Criminal Appeal in England.

For over three-quarters of a century there was much agitation in England in favor of some form of criminal appeal. Twenty-eight bills on this subject were introduced in Parliament from the year 1844 to 1906. Some of these reached a second reading, and a few were even referred to committees, but the majority did not get beyond the first reading. Of these twenty-eight bills, twenty-three provided for the granting of new trials in certain instances, five allowed appeals against severity of sentence except when sentence of death was passed; six permitted increase of sentence; one only provided for appeal against illegality of sentence.

In 1906 a bill was introduced by Lord Loreburn, the Lord Chancellor, giving a right to appeal to all persons convicted on indictment. The bill as originally drawn did not provide for a new trial, but it was later amended so as to include the right to a new trial when a verdict "is against the weight of evidence as understood in civil cases." After being further amended the bill passed the House of Lords. The amended bill was then sent to the Commons. Before it came to a second reading it was much criticized, both on principle and in detail. The greatest objection was to the provision for a new trial. It was urged that this amounted to double jeopardy, and that a prisoner should not be subjected to the oppression of a second trial. So strong was the objection to the bill in many quarters that it was not brought to a second reading.

In August, 1907, a bill introduced by the then attorney general (Sir J. Lawson Walton), became law under the name of the Criminal Appeal Act, 1907. The Act establishes a Court of Criminal Appeal composed of the "Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor." The Court at each sitting must consist of an odd number, never less than three. The decision of the majority governs. No dissents are allowed, and one judgment only is pronounced, except in the cases "where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court." The decision of the Court is final, except where at the in-

stance of the director of public prosecutions or the prosecutor or defendant the attorney general certifies that "the decision of the Court of Criminal Appeal involves a point of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought," in which case there may be an appeal to the House of Lords.

In a very recent case,⁸ the first appeal taken to the House of Lords under this section was determined. The Court of Criminal Appeal had quashed the conviction on the ground of error in admission of evidence and the prisoners had been discharged from custody. The House of Lords reversed this decision, holding the evidence admissible, whereupon the Court of Criminal Appeal set aside its record quashing the conviction, restored the judgment and ordered the re-arrest of the prisoners.

With the leave of the judge who tried him or of the Court of Criminal Appeal itself, a convicted person may appeal on a question of law or fact or against the severity of the sentence. In short, the act practically gives an unlimited right to appeal, to everyone convicted of an indictable offence in England and Wales.

But the Court of Appeal "may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred," and the court has had recourse to this proviso many times, and has defined the phrase, "miscarriage of justice," in a number of cases. In one case,⁹ the court says that this section enables it "to go behind technical slips and do substantial justice. Probably one test is that the facts proved should be consistent with innocence, and not consistent only with guilt." In another well considered judgment, it said:¹⁰

"Taking section 4, with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the

⁸ 1910, R. V. Ball, 6 Crim. App. Rep. 31.

⁹ R. v. Meyer, 1 Cr. App. Cas. 10.

¹⁰ R. v. Cohen, 2 Cr. App. Cas. 197.

case can be brought within the proviso. In that case the Crown have to show that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favor of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only miscarriage of justice, but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong direction of a point of law."

Where there is an appeal against sentence the Court is given the power to diminish or increase the sentence appealed against. This section of the act seemed to meet with general approval, as it enables the Court to set a standard of sentences, an important matter which is entirely disregarded in those states where the jury is given the power to fix the sentence. The power of the Court to increase the sentence appealed also tends to prevent fre-

quent and frivolous appeals, as some risk is involved in such appeal.

By another section of the act, "Where an applicant has been convicted of an offense and the jury could, on the indictment, have found him guilty of some other offense, and on the finding of the jury, it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury, a verdict of guilty of that other offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity." This section gives the Court power to reduce the verdict to one of a lesser degree, as from murder to manslaughter, and also in some instances to substitute for the verdict found, that of guilty of a related offense, as in the case of a conviction for larceny to substitute a verdict of guilty of embezzlement.

Notice of appeal must be given by appellant within ten days from the date of conviction. This time may be extended by the Court of Criminal Appeal, except in the case of a conviction involving sentence of death.

Full opportunities for appealing are given to all convicted persons. Governors of the prisons inform convicted prisoners of the right to appeal, and furnish them with instructions and forms for appealing.

In cases where an appellant must obtain leave of the Court to appeal it is provided that this leave may be granted by any one judge of the Court, "but if the judge refuses an application on the part of the appellant to exercise any such power in his favor, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act."

Unlike the practice in American appellate courts, the English Court of Criminal Appeal has the power to recall any witness, who testified at the trial. It may also order the attendance of, and may examine any witnesses who could have been compelled to testify at the trial, but who were not called. The court may also hear any competent witnesses who could not have been compelled to testify at

the trial, for example the appellant himself. In this way the court is given opportunity to investigate fully the merits of the appeal, and thus prevent a miscarriage of justice. Power is also given to the court to have witnesses examined before a special commissioner, who reports to the court.

The court is not bound down by statutory rules of practice, but is given power to prescribe its own rules, with the approval of the Lord Chancellor and a committee named in the act.

The Court of Appeal has not very often increased the term of a sentence but it did so in a very bad case of attempted murder which took place in London while the committee was there. A man got into an underground railroad carriage for the purpose of robbery, and in a tunnel shot and wounded a passenger in carrying out his design and barely escaped murdering him. Convicted of shooting with intent to murder he was sentenced by the trial judge to twelve years' penal servitude. But he appealed against the severity of the sentence, and here is what he got:

The Lord Chief Justice: In this case appellant appeals against a sentence of twelve years' penal servitude passed by Hamilton, J., on a conviction for shooting with intent to murder. Leave to appeal was granted by Darling, J., on the ground of the insufficiency of that sentence. We pointed out to appellant that his sentence might be increased if he persisted in his appeal, and he said he was aware of that fact. The defense of insanity was not raised at the trial, the appellant deliberately desiring not to raise it. The attempt to murder in this case was as deliberate and as well planned as any that has been before the Court, at any rate in my experience. The appellant bought a revolver and cartridges, and as the cartridges did not fit he sent them back and obtained others. He selected an afternoon train which did not stop at several stations, and which passed through a long tunnel. Chloroform was afterwards found upon him. On getting into the train he held a newspaper in front of him, behind which he appeared to be reading. He pulled the trigger four times; on the first and second occasions the revolver missed fire; the third and fourth shots passed close to Mr. Frost, and the fifth hit him in the jaw. The crime was attempted in a railway train passing through a tunnel, when a shout for help might not have been heard. Attempts of this kind must necessarily be most dangerous to persons travelling

alone, and as Hamilton, J., has said, but for the courageous conduct of the prosecutor, death might have been the result.

The Court is of opinion that the sentence of twelve years' penal servitude was insufficient, and that fifteen years would be a proper term. If the appellant is suffering from insanity he will be carefully watched and carefully treated, but that is no ground for inflicting a less punishment when it is quite clear that the crime was premeditated. The sentence of the Court is fifteen years' penal servitude, to date from the conviction.

The committee's comments on the Court of Criminal Appeal are as follows:

The Criminal Appeal Act was at first much criticized in many quarters on various grounds: (1) On principle, because there were those who believed that the whole idea of criminal appeal was wrong, the chief ground for such belief being that it was contrary to the precedent of many centuries. (2) That the right of a convicted defendant to appeal would tend to lessen the responsibility of jurors. (Lord Halsbury expressed this fear in a speech in the House of Lords on the second reading of the Criminal Appeal bill, 1906. It was felt by some that the jury, since its decision was no longer final, would not feel bound to weigh the case with the greatest care and give the prisoner the proper benefit of the doubt.) (3) That there would be frivolous appeals. (4) That the number of appeals would be overwhelming and that it would be necessary to appoint new judges to hear the many appeals.

The Court has been sitting nearly two years and a half and the experience of that time has shown that these critical fears were unfounded. Nothing has appeared to indicate that the jurors feel any less responsibility in considering their verdicts. If the prisoner's right of appeal has in any way affected the attitude of jurors, it has been in a favorable way, because as the jurors now no longer feel that what they are doing is remediless, they are less inclined to acquit improperly.

The Court is protected from frivolous appeals by the Act itself, especially by the provision requiring that the prisoner obtain leave to appeal in most cases. The power of the Court to increase the sentence in an appeal against sentence discourages improper appeals of that kind. Further, the power of the Court, in the case of an unsuccessful appeal against conviction, to order that the sentence shall date from the time of appeal instead of the date of conviction, tends to prevent frivolous appeals against conviction. In *Rex v. Maurice* (1908, 1 Cr. App. Cas. 176, 177), the Court said that "its general rule is to make sentences date from the appeal."

Lastly, the Court has not been overwhelmed with the number of appeals. Since every convicted person has the right to appeal or to move for leave to appeal, one really wonders, notwithstanding the restriction against frivolous appeals, at the comparatively small number of appeals.

One of the chief objects of the framers and supporters of the present act was to secure something approaching uniformity of sentences for sim-

ilar offenses. It was in part to secure this that the court was given the power to increase, as well as to reduce, the sentences appealed against. Great differences in sentences for similar offenses are generally due to the varied personal attitudes of the judges who impose the sentences. The way to remedy this is to subject the sentences to the supervision of a court whose own standard will not change.

As already noted, the Act expressly denies the court the right to order a new trial. In the case of an appeal against conviction the court must either affirm or quash the conviction. Where it appears on the hearing of an appeal that some serious error of law was committed in the trial, the court is obliged to quash the conviction even though the evidence at the trial strongly indicated the defendant's guilt.

The committee cites a number of expressions of regret on the part of individual judges that the court was not given the power to order a new trial in exceptional cases. But the parliament that passed the act creating the court was strongly opposed to a man being placed twice in jeopardy. "If the King's judge makes a mess of the case it was not the fault of the prisoner, he had submitted to the ordeal and it is not fair to make him go over it again,"—such is the popular argument. And the judges themselves are by no means agreed that it would be a good thing to do. In a letter to one of the members of the committee an English judge, who had read the report, says: "This view that the court should be able to order a new trial is by no means universally held. I, with many others, think that a man should not be put on his trial a second time in a criminal case, unless there has been no verdict in the first."

Continuing, the report says:

One who attends the hearing of a criminal appeal in England must be impressed by the knowledge which the Court displays of the record of the trial. It is very evident that before the hearing of the appeal the judges have studied and considered with the greatest care the shorthand notes and the trial judge's report. In fact, in several instances the judges showed greater familiarity with the testimony of the witnesses at the trial and the summing up of the trial judge than the counsel who was arguing the appeal.

The judgment of the Court is generally given immediately after the hearing of the appeal. This practice makes for speedy justice. If a difficult point of law is involved in the appeal, the Court will sometimes deliver a written and considered judgment.

From the opinions expressed by the judges during the hearing of appeals and from the judgments delivered, one is enabled to note several points on which the Court has developed a definite attitude. Thus the Court has discouraged appeals involving questions of fact, where the appellant might reasonably have been expected to testify at the trial, but did not.

On a number of occasions various judges of the Court of Criminal Appeal expressed strong disapproval, when it appeared that the appellant did not set forth his defense before the magistrate, but reserved it till the trial. In *Rex v. McNair* (1909, 2 Cr. App. Cas. 2, 4), the Lord Chief Justice said: "If a prisoner is ill-advised enough to say at the Police Court that he will reserve his defense, thereby making it impossible for his story to be investigated before trial, it is no ground upon which we can interfere with the verdict. For an innocent man, the sooner his defense is raised the better." Again, in *Rex v. Maxwell* (1909, 2 Crim. App. Cas. 28, 29), the Lord Chief Justice said: "The jury were entitled to consider adversely to appellant his silence at the Police Court, and the fact that he reserved his defense."

One of the frequent grounds of appeal is that the trial judge wrongly directed the jury. The decisions of the Court of Criminal Appeal have resulted in improving the summings up of the trial judges, as a large percentage of the convictions quashed were due to improper direction by the judge. Now and then the Court of Appeal will make a strong intendment in favor of a summing up. Thus in *Rex v. Nicholls* (1908, 1 Cr. App. Cas. 167, 168), Channell, J., said: "It was true the learned judge had omitted to discuss the defense raised on behalf of appellant in his summing up. But if he had adverted to it he might have done so unfavorably."

The Court of Criminal Appeal has borne in mind the fact that the keynote of the Criminal Appeal Act is the securing of "substantial justice." The Court has not laid stress on technicalities either for or against the appellant. Thus, in some instances, counsel have been permitted to argue points not set forth in the notice of appeal, and on the other hand, in considering appeals against conviction the Court has looked at the case as a whole and considered it upon its merits. In the hearing of the appeal of *Rex v. Jackson* (1910, 5 Cr. App. Cas. 22), it was shown that when the case for the prosecution was closed at the trial there was no evidence upon which a conviction could be supported. The chairman was not asked to take the case from the jury, but the prisoner put witnesses on the stand, and testified himself. From this testimony it clearly appeared that the prisoner was guilty, and the jury convicted. At the hearing of the appeal counsel for the appellant argued that the chairman should not have left the case to the jury. The Court of Appeal said that, as the point was not made at the trial, they would look at the case as a whole and from that it appeared that the appellant was guilty, hence the conviction ought to be affirmed. The Lord Chief Justice said: "On the point of miscarriage of justice we are entitled to look at the facts as a

whole." The general attitude of the Court can best be expressed in the words of the Lord Chief Justice in *Rex v. Stoddart* (1909, 2 Cr. App. Cas. 217, 246): "This Court sits here to administer justice and to deal with valid objections to matters which may have led to miscarriage of justice."

The detailed results, compiled from the official reports, of the work of the Court of Criminal Appeal from its first sitting on May 15, 1908, to July 4, 1910, are as follows: Applications for leave to appeal and appeals from the order of a single judge refusing leave to appeal, 194. Of these 41 were granted, and 153 were dismissed. Appeals against conviction, 217. The Court quashed 62 convictions and affirmed 155. There were 128 appeals against sentence. Sixty-one sentences were reduced, 1 was increased, 5 were quashed and 61 were affirmed. There were 19 petitions to call further evidence, of which 8 were granted and 11 refused. In one case the Court adjudged the applicant "guilty, but insane."

As a result of this study of the English criminal procedure the committee made the following recommendations:

1. All objections to the indictment should be made before evidence is heard, and errors in matter of form amended at once.

2. The prosecuting attorney and counsel for the defense should before trial consider and discuss the qualifications of the individual members of the jury panel and agree to the dismissal of any one clearly incompetent to be a juror.

3. The *voir dire* should be limited to the asking of questions strongly tending to show incompetency or bias in the present trial.

4. All prisoners on trial upon indictment, who are unable to employ counsel, should be furnished with legal assistance throughout the trial, including the arraignment.

5. The prosecuting attorney, instead of being a partisan, should investigate the case from a non-partisan standpoint, and should make an impartial presentation of the evidence to the jury.

6. The fee system, wherever it exists, for the compensation of prosecuting attorneys, should be abolished.

7. Counsel for the prisoner should defend him by endeavoring to disprove his guilt, and never by injecting error in the record.

8. The trial judge should not be a mere presiding officer, but should take an active and controlling part in the trial. He

should restrict counsel in the asking of irrelevant questions. He should promptly overrule and discourage technical objections. He should never permit counsel to intimidate or improperly to confuse a witness. He should sum up the evidence to the jury and direct them as to the law applicable thereto.

9. New trials should never be granted for technical errors, but only to prevent miscarriage of justice.

10. Prosecutions for minor offenses, where the accused is not likely to evade the hearing, should be begun by summons, as in civil cases.

This report has been printed in full in the *Journal of Criminal Law and Criminology* and in the form of a supplement has been widely distributed. It has been noticed and commented upon in most of the leading newspapers of the country, both lay and professional, and without exception it has received the warmest commendation and its suggestions have been unanimously indorsed.

The press of the country is reflecting the public opinion of the day which is insisting that our legal procedure be reformed and that the American Nation shall no longer be subject to the reproach, that while in other callings and professions and in other branches of science and affairs, we keep pace with the rest of the world; in the matter of the administration of our civil and criminal law—our legal procedure,—we are nearly a century behind other civilized nations. That this public opinion is already beginning to act upon the judiciary and that the public dissatisfaction is already showing results, we have pointed out on another page.

Reform in legal procedure is one of the burning questions of the day, and that it will be brought about before long no student of the subject can doubt.

GROTIUS AND THE MOVEMENT FOR INTERNATIONAL PEACE.

That Hugo Grotius filled a very large space in the eye of his contemporaries is beyond question. Those of his own and succeeding generations best qualified to judge are almost unanimous in ranking him as one of the foremost characters of modern history. But it seems to be beyond question also that with the lapse of time, he has come to be regarded vaguely—perhaps even rather vaguely by the members of that profession of whose glory his career is a part.

It is because he is worthy of very definite remembrance, and never more so than in our day, that I am now venturing to speak briefly of his career and of the effect of his work on the movement for international peace.

He was born in Holland in 1583. He came upon the scene when armed conflict was so constant and universal as to seem inevitable. There was not an hour in his life when Europe was free from it. He was still young when The Thirty Years War began, and he witnessed nearly the entire course of that struggle, which ended three years after his death.

That war was so general and violent as to arouse the fear that civilization on the continent might be withered by its touch and men fall back into barbarism. But the decree of destiny was otherwise. Bancroft says that "The brightest lightnings are always kindled in the darkest clouds," and this applies to The Thirty Years War, for in spite of the horrors which marked its long duration, its immediate and far-reaching consequences broadened the foundation and strengthened the fabric of the civilization whose permanence it had seemed to threaten. There were at stake the ambitions of imperialism, and that it resulted in their final

defeat is an event the importance of which cannot be exaggerated.

The ancients had no real conception of a state system made up of equal nations, the independence of each respected by the others, each growing in experience, gaining in knowledge, and improving in all desirable practices, and the citizens steadily educated by the performance of the duties of citizenship. No such anti-imperialist conception was possible under the Roman rule. After Rome was broken into fragments, there was still for a time no such conception. In the centuries that followed, the contest was, roughly speaking, between the forces on the one hand which represented the Roman idea, and the forces on the other hand which, never united or harmonious, and always more or less individual and local, represented various plans of government; at one time, for instance, in the south of Europe the plan which had the borough for its main feature, and at another time, in the north of Europe, the plan of feudalism.

So fatal to progress was the lawless confusion everywhere prevailing, and so apparently barren the situation of any prospect of relief, except by restoring the world empire, that many of the best and wisest men of the middle ages longed for that event. The *De Monarchia* of Dante, who was among the best and wisest, is the vision of such an empire, which he assumed to be the natural and necessary government of the world.

Under the operation of many influences, however, a new conception took form, finding at length expression in the system of states which as then existing, was guaranteed by the treaties known as the Peace of Westphalia, which closed The Thirty Years War. The change was gradual. Here and there a community, weary of the tumult and clamor and oppression, successfully asserted, under resolute leadership, its right to exist as a nation. The assertion of this right was nowhere more bitterly combatted than in Holland and the other provinces of The Netherlands which, led by

William of Orange, came into national existence as the Dutch Republic only after one of the most splendid contests in which a people ever engaged.

It is not likely that Grotius, clear sighted and optimistic, shared the extreme fear aroused by The Thirty Years War. But a deep sense of its injustice helped to imbue him with that desire for more peaceful conditions which we may think of as his master passion. And he was certain that the advance of civilization could be made sure and his desire realized only by enforcing the new conception which gave promise of a system of states enjoying individually an increasing measure of domestic peace and able by deliberate and orderly methods to co-operate in efforts for international peace. In his historical works, which vindicated the formation of the Dutch Republic, and more particularly in his greatest work—his work on the law of nations, the *De Jure Belli et Pacis*—he challenged all of the claims of imperialism and every contention which, as he believed, made for war instead of for peace, and thus, though he had then passed away, impressed with his view those who negotiated the Peace of Westphalia.

It is clear, as a writer has said, that "the independence of the state is the very postulate of international law." As the concession of the necessity of a stable system of equal and independent states dates from the time of Grotius, so the modern development of the law of nations dates from his time. And of that development it is not too much to say that he was the pioneer and the prophet.

Let me glance at the career of the man who is thus characterized by a volume of testimony, which in its later growth is marked by the absence of almost any word of cavil or dissent.

A few miles from the Hague is the town of Delft. Delft was Grotius' birthplace, and there he now rests within the

same church which contains the tomb of his compatriot, William of Orange.

From his youth he was so conspicuous that the record of his life, which has come down to us, is very complete, and the figure which it presents very distinct. There even survive portraits of him depicting, as the historian Motley says, a man "of singular personal beauty, tall, brown haired, straight featured, with a delicate aquiline nose and piercing dark blue eyes." His mental endowment was quite as striking. There have been other minds as vigorous and versatile, but few more so, and there has hardly been a mind more precocious. The story of his youthful achievements would be incredible without the convincing evidence which is supplied from many sources. Entering the University of Leyden at the age of eleven, he attracted the attention and won the friendship of the leading men of the faculty, one of whom at least was a scholar who is not yet forgotten. It was quickly predicted that he would rival, if not excel, that other remarkable Hollander, Erasmus, the memory of whose extraordinary gifts and learning was then fresh. When he received his degree at the age of fifteen, his powers were mature, his general education as ample as the university could afford, and his preparation complete for the profession which he had selected. In making that selection he followed the example of his father and grandfather, both of whom were lawyers.

Confident and eager, his hands filled with early laurels, but stretched out for those more to be desired, he at once went to the front. He tried his first case in 1599, and at the age of seventeen he was in full practice before the courts of The Hague.

Meanwhile, just after his graduation he had accompanied the leading statesman of his country, John of Barneveld, Advocate of Holland, on a diplomatic mission to Paris. There, while in his sixteenth year, he was welcomed to the brilliant circle of which Henry the Fourth, gathering about him the most gifted intellects of France, was the chief. It

was then that he received from the University of Orleans the honorary degree of Doctor of Laws.

As a boy, a university student, and a young lawyer his scholarly tastes and his talent for research and literature were displayed in a variety of original productions and translations. The critics comment upon the extent of his knowledge, which was that of an expert in many subjects, including astronomy and mathematics, upon the strength of his reasoning and upon the elegance and animation of his style which adorned whatever he wrote. Among his youthful writings was a history of the struggle of the Provinces with Spain. The States General of the Republic chose him over many others for this task when he was only twenty and not offering for the appointment.

In the light of this recital we do not wonder, that at an age, when most men are barely standing on the threshold of the serious business of life, Grotius was spoken of as the "miracle of Holland" and the "pride of Europe."

His reputation as a lawyer grew rapidly and he was still very young when he was elevated to an office which, discarding its local name, we may think of as that of Attorney General of Holland and Zealand. Already he had been engaged in great cases. One of these was of vital interest not only to his client, but to more than one nation and started currents of thought and action perhaps unexampled in the annals of litigation. His client was the Dutch East India Company which, in its commercial ventures, was forcibly opposed by the Portugese government by virtue of its prescriptive claim of dominion over the eastern seas. One of the vessels of the Company, using force against force, had captured a rich Portugese galleon in an encounter in the Straits of Malacca. It was contended in Holland in behalf of the Portugese, that the Company could not lawfully make such a capture, and the broad question was raised of the right of all to navigate and fish in the open seas without being limited or restricted by such claims as that of Portugal. The brief, so to speak, of Grotius on

this question was prepared in 1604, when, as we would say, he had just attained his majority. The brief was not published and the manuscript was not discovered until 1868, when it was found that one of the chapters of the brief was identical with the work entitled *Mare Liberum* which was published by Grotius in 1608. The *Mare Liberum* was afterwards answered by the work entitled *Mare Clausum*, the author of which was none other than the famous lawyer John Selden, of the Inner Temple, London. The English were making, in respect to the northern seas, a claim similar to that of the Portugese with respect to the eastern seas, and Grotius' argument applied as well to the one claim as the other. The proposition for which he stood was that the ocean is free to mankind for the purposes mentioned. This proposition is now conceded as a principle of international law, but it had not yet been conceded by England when prior to the war of 1812 the British government exercised the right of searching vessels on the high seas. The proposition was, however, successfully urged by Great Britain in the Behring Sea arbitration of 1893 against the claim of the United States in respect to the Alaskan waters. Thus his employment as counsel led Grotius to a careful study of maritime law which resulted in his argument in favor of a principle which was then considered novel and which, reluctantly accepted by great nations, is at last in our time approved by all.

A master of maritime law and a leader in that branch of his profession, it is not a mere fancy to suppose that Grotius was the adviser of the merchants and mariners of his country, whose memory lingers in the early history of America. They were the men who, seeking chances for colonization and commerce, made the flag of The Netherlands as well known along our Atlantic seaboard as that of England, and not at New Amsterdam alone, for the ships which they owned and manned were a familiar sight as far south as the harbor at Jamestown, where the right of the Dutch to trade freely was secured by a statute of our colony. It was not in such a ship, however, but, as if the event must

have an ominous circumstance, in a war vessel flying the same flag, that the first negroes were brought by his countrymen to Virginia.

In the flush of his labors and successes at the bar, the public demand for his services began to draw Grotius away from his profession. He was sent by his government on a mission to England that had reference to the same question which was the subject of the *Mare Liberum*. So the lawyer and author entered the field of diplomacy. As in his youth he had impressed Frenchmen, so now, according to information which can be regarded as accurate, for letters remain from distinguished men with whom he came in contact, he stirred the admiration of Englishmen. This is significant evidence of his unusual personality, for his visit fell in that period when the English intellect was in its full flower—the period which would be always memorable had it produced only Shakespeare, Bacon and Raleigh.

While still a busy lawyer he was chosen to sit as a representative in the Assembly of the States of Holland, and afterwards as a representative in the Assembly of the States General of The Netherlands. Entering the field of statesmanship he took his place as one of the leaders of the Dutch Republic, beside his patron and friend, Barneveld.

At thirty-five he was eminent as author, lawyer, diplomat and statesman. His private life was stainless, his genius had brought renown to his country, and he had proved himself an efficient servant of Holland and the Republic. And yet it was then that his good fortune having reached its height, the ebbing of the tide set in. It was a time of theological controversy, and into that field also Grotius entered under the mandate which seemed to impose itself upon every one of prominence. The issue in Holland was between the followers of Calvin and the followers of Arminius. The debate was carried on by those who reasoned interminably,

"Of providence, fore-knowledge, will and fate,
Fixed fate, free will, fore-knowledge absolute."

Grotius was a friend and adherent of Arminius, who had been a professor in the University of Leyden. His views he put forward in essays which, as those who have read them tell us, were marked by a conciliatory tone then most rare. It was in fact his tolerance—a sort of sweet reasonableness that marked all the workings of his mind—that brought on the crisis of his career. With Barneveld he was instrumental in having an edict enacted forbidding ministers to handle disputed dogmas. There was agitation. Popular disturbances took place. There was even rioting. In 1618 the authorities of the Republic, hostile to the cause which Barneveld and Grotius espoused, had them arrested and imprisoned. They lay in prison until the spring of the next year, when they were brought to trial at The Hague.

The court was made up of twenty-six persons called commissioners, nominated by the States General. The defendants objected to the authority of the States General, claiming that they were amenable only to that of Holland. They objected to the jurisdiction of the court, claiming that it was illegally constituted and they objected to its integrity, claiming that among its members were those who were their personal enemies. They objected to the statement of the charges, as we would say, to the indictment, a sample of the allegations being that “they were public disturbers of the tranquility of the Republic,” protesting that it should be more explicit in order that they might be advised of what they were really accused. All of their objections were overruled. They doubtless expected nothing else. They perhaps understood that the result being predetermined, the accusation had been framed in the most general language so that the discretion of the court might be untrammelled. They perhaps realized that they were in the midst of one of the long line of tragedies which ended only with those changes in criminal jurisprudence in later times which drew an impassable line of separation between the legislative and the judicial functions—such a tragedy as had for its victim the Athenian philosopher—such a tragedy as had

the Divine Man for its central figure. They defended themselves with great ability and skill, Barneveld being tried first. Both were convicted. Grotius, upon being informed of the result, summarized the prosecution by declaring that he had been tried, convicted and sentenced against all principles and forms of law.

It was on the 13th day of May, 1619, that an officer visited the cell of Barneveld, who was confined apart from Grotius, to inform him that, according to the judgment of the court, he had only a few hours to live. There was not then a more accomplished statesman in Europe than the man summoned to his death, or one more widely known. In The Netherlands there was no man more capable and patriotic and none who had rendered such long and valuable service. He, next to William of Orange, deserved the gratitude of the people of the Dutch Republic whose institutions the two men laboring together had raised and supported on the ruins of Spanish tyranny. His first inquiry of the officer was, "Have you heard whether Grotius is to die?" When the officer could not tell him, Barneveld remarked that he would most deeply grieve if such were the fact. "That great rising light, Grotius, is still young" he said, "but a very wise and learned gentleman, devoted to his fatherland with all his zeal, heart and soul, and ready to stand up for her privileges, laws and rights. As for me, I am an old and worn-out man. I have already done more than I was really able to do." In the early morning, after a night, as serene within this cell as under the stars without, Barneveld went to his execution. Among his last messages were words of farewell to Grotius.

Grotius' life was spared. His sentence was perpetual imprisonment and the confiscation of his property. Removed from The Hague to a castle nearby, he was confined in two small rooms. For bodily exercise he spent a part of each day spinning a top which his jailer had allowed him to obtain. I again quote Motley, who describes his deportment in prison as a magnificent moral lesson:

“And thus,” says Motley, “nearly two years wore away. Spinning his great top for exercise, soothing his active and prolific brain with Greek tragedy, with Flemish verse, with jurisprudence, history and theology; creating, expanding, adorning with the warmth of his vivid intellect, moving the world and doing good to his race from the depth of his stony sepulcher Grotius arose superior to his doom and took captivity captive.” At the beginning he was in solitary confinement and treated with rigor. Soon, however, the treatment was more lenient and his wife was permitted to be with him. At last with her aid he made a romantic escape concealed in a chest used for carrying books to and from the castle. He was transported in that way for some distance to a place where those waiting for him dressed him in the garb of a mason, with hod and trowel, and in that disguise he made his way southward and finally to Paris.

A quarter of a century of his life still remained. He spent much of it in the service of the government of Sweden as its representative at the French Court. But before entering that service he published in 1625 his work on the law of nations, which gives him his fame. It is interesting to know that this work, like the *Mare Liberum*, had its origin in his labors as counsel for the Dutch East India Company in connection with the case already mentioned. This has been made apparent by the comparatively recent discovery of his brief in that case. The brief, written when he was only twenty-one, simply foreshadows the greater work of his later years.

Always yearning for his native land, he returned to Holland only to be sent into banishment. Towards the end, having severed his relations with Sweden, he started on a voyage in the direction of home. He was shipwrecked on the shores of the Baltic and, travelling overland in an open vehicle in a heavy storm, reached the town of Rostock, weary and ill. There among strangers he died in 1645. In

the unpretentious epitaph which he left he described himself as captive and exile.

If his last journey was with the design of returning to Holland, he underestimated the hostility that still existed there against him. The feeling was so strong that it even failed to disappear with his death. Years afterwards, when his body was being removed to Delft, the coffin containing it was stoned in the streets of Rotterdam. The sentiment of pride and worship with which Holland now cherishes him as her son, furnishes another example of that reversal of popular judgment of which the traveller in the old world is so often reminded. He sees in the yard of Westminster Palace an imposing statue of Cromwell, holding the very place where his skull fixed upon a pike once looked down. He sees in the Field of Flowers, at Rome, the statue of Bruno, which was erected not long ago, on the three hundredth anniversary of his death, upon the very spot where he was consigned to the flames. Both Cromwell and Bruno were contemporaries of the Hollander who, having been derided, is now acclaimed, by his countrymen.

It is because of his greatest work, which upon its publication was at once read and discussed throughout Europe, and which soon contributed to bring about, if indeed it did not inspire, the Peace of Westphalia, that Grotius is thought of as the pioneer and prophet of the modern development of the law of nations.

That law, like any other body of law, is, of course, the result of a process of evolution. The process up to the time of Grotius had, however, served only to produce what an American publicist has described as a chaos of opinion. Dealing with this crude and disorderly mass, Grotius wrote the *De Jure Belli et Pacis*.

Hallam, in his careful analysis, says, "The book may be considered as nearly original in its general platform as any work in an advanced stage of learning can be. * * *

No one had before gone to the foundations of international law so as to raise a complete and consistent superstructure; few had handled even separate parts or laid down any satisfactory rules concerning it." It is an exhaustive compilation of the views of statesmen, jurists and philosophers, as well as everything in the way of precedent. But it is far more than this. The work is an attempt to ascertain the principles which should control nations in their conduct towards each other, and which the author considered should guide the evolution of the law of that conduct.

These principles he announced at the time, as I have said, when the knell of the world empire idea was being sounded. Their steady application, as suggested at the outset, was conditioned upon the existence of a system of equal independent states. And their application has become more direct and effective as the spirit of nationalism, harmonizing and centralizing, and yet not centralizing to the point of endangering a reaction in favor of imperialism, has strengthened that system. In the recent period that spirit has been actively at work. To illustrate, during the last century feeble and restless communities, under the lead of Cavour, were welded into what is now the Italian nation, and other communities, under the lead of Bismarck, were welded into what is now the German nation, and a little earlier thirteen American communities had been welded into the plural unit which is our Republic. And we have seen our constitution so modified—the federation so completely nationalized—that no question can now be raised by any of our states which is incapable of peaceable settlement.

Grotius declared as a fundamental premise that a nation, like an individual, is able by reason to discern what is just and, having done so, is bound by a moral obligation to refrain from what is unjust. He thus found in the natural law, the everlasting existence of which as he assumed, is not dependent on experience and is not affected by the

alteration of creeds and manners, the basis of international law.

He unreservedly condemned the excesses of war as unjust. He said, "I saw in the whole Christian world a license of fighting at which even barbarians might blush; wars begun on trifling pretexts, or none at all, and carried on without reverence for any divine or human law, and as if a single declaration of war warranted any crime."

He did not condemn every war as necessarily unjust, but he took issue with those who considered any war desirable. One of his contemporaries was Machiavelli who, in his treatise called *The Prince*, said, "A prince is to have no other design, nor thought, nor study but war and the art and discipline of it. For, indeed, that is the only business worthy of a prince." This treatise was published with the approval of the papal authority. The same authority, and the statement is not made as a reproach, but to indicate the dominant sentiment of the times, placed the ban of its censure upon the merciful and pacific work of Grotius.

He did not delude himself by believing that armed conflict would soon cease, but he condemned as unjust any war which is possible to be avoided, and he was convinced of the availability in most instances of some method of avoiding war.

He was specific in pressing upon nations the duty of settling their differences by conference, by arbitration, or even sometimes by lot rather than by war. As a most competent critic has said, Grotius planted the germ of international arbitration, as we know it in modern thought. Along the same line he urged that conventions be held in which those nations, not themselves interested in pending controversies, might decide those controversies and arrange for the enforcement of the decisions, so as to remove any ground for conflict between the nations immediately interested. Again he was forecasting the future.

Looking over the interval since the death of Grotius, there is no difficulty in perceiving how his views have gained

ground, and how extensively the evolution of the law of nations has been guided by the principles which he advocated.

He knew that nations, without their consent, cannot be subjected to the natural law which imposes upon them moral obligations. But he insisted that they should consent to be thus subjected. He meant that their positive law should express their moral sense. He was adversely criticised for theorizing and dreaming about what the law of nations should be and, as some believed, never would be, rather than announcing what it was. But as I understand, the validity of his premise has for a long time been uncontested. Unless I misapprehend, it has from the foundation of our government been approved in this country. It seems to pervade the utterances of our courts. As far back as 1781 the Federal Court of Appeals, at Philadelphia, said in an admiralty case, "As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it." In another admiralty case, Chief Justice Marshall, speaking for the Supreme Court, denounced the slave trade as contrary to the law of nature and as a practice which should be forbidden by the law of nations. In passing, it is of interest to observe that in the same case Marshall said, "No principle of general law is more universally acknowledged than the perfect equality of nations," thus stating the doctrine which was slowly gathering strength in Grotius' time, but which might have disappeared had The Thirty Years War resulted differently.

In the interval since the death of Grotius, war has become far less frequent, and it has become undesirable even in the view of those whose occupation it

has been. I suppose, for example, that armed conflict has never been more deeply deplored than by the great soldiers of this Commonwealth who sleep at Mount Vernon and Lexington. About this time last summer, at Waterloo, I heard an intelligent foreigner, who was rehearsing the story of that most noted of battlefields, declare with emphasis that if the Virginian had lived in a military country and in a military age, our Stonewall Jackson would have shown himself the greatest commander of history. And I reflected that no one would have been more thankful than Jackson that such was not his fate.

In the interval with which we are dealing the excesses of war, such as the execution of captives, the refusal of terms of capitulation to towns, and the wanton devastation of an enemy's country, have met with steadily increasing reprobation. The war between Russia and Japan showed the willingness and ability of armies, albeit not of the most highly civilized nations, to abstain from adding by unnecessary violence to those horrors of war which are inevitable.

In the interval many wars have been prevented by arbitration under general treaties, or by arbitration under special treaties. An instance of the latter class is the proceeding to which our government was a party which resulted in the Alabama award, and which is a shining example of the possibilities of arbitration.

The interval has been marked by almost numberless conventions, under various names. The most important among these for more than two hundred years was the Congress of Vienna, held at the close of the wars of Napoleon, in which the recognition of the need of a balance of power among the nations, which was expressed in the Peace of Westphalia, was supplemented by the formal recognition of the need of mutual concessions by each nation in order to that concert of action which is a condition of the safety and welfare of all. Some of the conventions have, unlike the one just mentioned, dealt with a single subject. The

convention held at Geneva in 1864 was of the latter class. It is because of the measures adopted at that convention, which have met with such general and unqualified commendation, that even when war is flagrant and in the shock of battle, the Red Cross is a sign that the brotherhood of man is still a living force.

The course of the evolution of the law of nations, still guided by the principles of Grotius, became regular and rapid when in 1899 the First Peace Conference was held, and even more so when the Second Peace Conference was held in 1907, in which all the nations by their representatives participated. These conferences were not brought about as were all former congresses by the necessity of grappling with problems consequent on wars which had just occurred or were still in progress. To repair the ruin and havoc wrought by war was the chief purpose of those congresses. The purpose of the conferences to which I am now referring, was to guard against the recurrence of armed conflict and minimize the enormous evils directly and indirectly incident thereto.

Not until the Peace Conferences, of which beyond peradventure there will be others in fairly quick succession,—not until thus a method was devised of enabling the nations to come together for complete concert of action relative to every subject,—did the evolution of the law of nations acquire a very close resemblance to that of municipal law. It is easy, however, to see how striking the resemblance has now become.

As a state has its law-making body enacting statutes, so now the nations have a vehicle for the expression of their international will which, bearing in mind the many differences that exist, may not unfittingly be called the parliament of nations.

Writers have disagreed as to the origin of the law of nations, its elements and sanctions. Lord Salisbury said with sarcasm that it is what this or that writer thinks. The

courts have often found it rather nebulous. As described by the Supreme Court in the case decided just after the Revolution, in which the Virginia act to sequester the property of British subjects was construed, it corresponded for lack of definiteness with the law of England as the latter was, say, in the fourteenth century, at the time when usage was slowly hardening into custom, and when there was little legislation, as witness the fact that the Parliament of Yarmouth passed but a single statute. But the work of the conferences marks the advent of a new era. As the law of England became more certain and precise, as the municipal law of every modern state has tended towards certainty and precision and towards codification in some form or other, complete or partial, so that positive tendency is now manifesting itself in the growth of the law of nations.

Furthermore, as a state provides tribunals to which disputes may or must be submitted for settlement, in order that civil strife and strife between individuals may be averted, so now the nations in their conferences are legislating similar tribunals into existence. Already they have in operation a Permanent Court of Arbitration, before which at this very time is being heard a controversy between Great Britain and the United States of very long standing. In this case there is at issue the interpretation of the provisions of the Treaty of 1818 which concern the rights of our fisherman on the coast of Newfoundland, and perhaps incidentally the question whether Hudson Bay is a closed or open sea. The matters which are to be peacefully disposed of in this case are more complicated and serious than those which have caused any of our foreign wars. It is proposed to bring into operation also a Court of Arbital Justice composed of judges not selected by the parties to a particular case, but impartially chosen in advance, and within the last few weeks our Secretary of State has made an announcement, not officially but very confidently, to the effect that this is expected to be accomplished without waiting for another conference to perfect

the plan which was left incomplete in 1907. When this is done there will be an international tribunal open and convenient of access, to which the nations can carry their disputes for determination just as their disputes are carried by the states of our Union to the Supreme Court for settlement. It is not improbable that the spectacle of nations appearing before the bar of the proposed court and submitting to its final jurisdiction, will at no distant date, as time is reckoned in the life of communities, be so frequent as to excite less wonder and comment than has been caused the world over by the spectacle of American states resorting in the same way to a court of their own creation.

It is for the nations to determine hereafter what questions they shall be compelled to submit to the tribunals which they are organizing. They have already committed themselves, with reservations, to the principle of compulsory submission. In future conferences it will be contended that but one question, namely, the question of independence, can fairly and logically be reserved. The skeptics who doubt that this will be the final conclusion, and who doubt that the nations will then protect the authority of their tribunals by making adequate provision for the enforcement of the judgments they may render, ignore a fact which is paramount, and which only need be suggested: As in the modern state the development of municipal law, in accordance with enlightened principles, is controlled by national public opinion, so, in the modern period, the development of the law of nations, in accordance with the principles which have been stated, has been and is being controlled, less and less by arbitrary rulers and cabinets and by sporadic and isolated forces, and constantly more by what we may call international public opinion. Jeremy Bentham, who was once, like Grotius, considered a dreamer, but whose opinions have most materially affected the jurisprudence of England and America, outlined a plan for such a court of justice as is now proposed. He was convinced that with such a court in existence, the influence of the press

would be sufficient to prevent a refusal to invoke its jurisdiction and sufficient to insure the execution of its orders. International public opinion, only one of whose many voices is the press, which is vastly more influential than when Bentham wrote, was never so concentrated and relentless as now, and was never exerting itself so persistently in behalf of the cause of peace. Except for this opinion which proceeds from the aroused and active intellect and conscience of the world, the call for the First Peace Conference would not have been issued in 1898 by the Russian government, and the Emperor's rescript, which conveyed the invitation to the nations, would not have contained such an unreserved discussion of the dangers and burdens of armed peace and such a powerful appeal for the limitation and reduction of the armies and navies which the nations are maintaining. It was this opinion which the nations obeyed when they considered in their conference the question of limiting their armaments, and under the stress of this opinion, the danger of war being minimized by the successful operation of the tribunals designed for the peaceful disposition of all controversies, they will at length provide for the reduction and gradual elimination of their military establishments, which have been called a satire on civilization.

The two conferences which have been alluded to were held at The Hague. There also will be held those which are to follow. The nations have selected that historic city as the seat of their parliament and their courts. In opening the first conference its President remarked, "It is here, as one may say, that the cradle of the science of international law has stood." The scholar and diplomat, Andrew D. White, who headed the delegation from the United States, wrote in the delightful diary which he kept during the sessions of that conference, "More than ever it is clear to me that of all books ever written—not claiming divine inspiration—the great book of Grotius, 'War and

to discover whether the mere violation is negligence or not) is concerned. For if the violation is all that the jury need take into consideration in determining whether the offender has been guilty of negligence or not, it follows that negligence can be based on such violation alone, even when, as under the third rule, the jury are told they may consider other facts as excusing or explaining the violation, because it is apparent that the violation alone is regarded as negligence, as it may be found so by the jury if no excuse or explanation is offered.⁵ The excuse or explanation merely rebuts the *prima facie* case that the violation is negligence, but does not prevent that *prima facie* case from coming into existence.

While the general rules just laid down are easily extracted from the mass of opinions, yet those opinions are so conflicting in their reasoning that many of them are practically irreconcilable, even those adopting the same general rule. One great difficulty in reaching a satisfactory determination of this question is, that the violation of the law has seldom been the only fact on which the action is based, in consequence whereof, the *ratio decidendi* is often obscure. Another is, that almost all courts regard violation of an ordinance and violation of a statute regulating speed as producing the same effects,⁶ without making any distinction in these cases between the two kinds of laws, a difference which they expressly recognize elsewhere,⁷ laying down as a general rule that "violation of a statute or an ordinance is negligence," or some evidence of negligence, as the case may be,⁸ or, where violation of an ordinance is in question, the court will base its decision on a precedent where violation of a statute was the point decided.⁹ It cannot be predicted what these courts would decide if the question whether or not any difference between

⁵ Colorado Midland R. Co. v. Rob-
bins, *supra*.

⁶ Jackson v. R. Co., *supra*; Correll
v. R. Co., *supra*.

⁷ Bott v. Pratt, 33 Minn. 323. Cf.
State v. Lee, 29 Minn. 445

⁸ Jackson v. R. Co., *supra*; South-
ern R. Co. v. Stockdon, 106 Va. 693.

⁹ Correll v. R. Co., *supra*.

violation of the two kinds of laws exists were directly presented to them. The whole subject is in a chaotic state, and it is apprehended that a failure to sift this problem to the bottom is responsible for its present unsettled condition.

There is prevalent, too, a vague idea in regard to the question that consciously or unconsciously leads many courts and lawyers to take a view of the subject that stifles further inquiry. The following quotation illustrative of that view is from Thompson's work on Negligence, and includes almost every fallacy by which courts have been misled. It discourses vaguely and intemperately, and wanders into the field of constitutional and political law; it confuses ordinance and statute, and by a *petitio principii* assumes the true point in issue, which is, whether the legislative power has declared that violation of its speed laws shall be negligence.

"It is to be regretted that two or three authoritative courts have fallen into the aberration of holding that the violation of a statute, or a municipal ordinance, enacted for the public safety, does not establish negligence *per se*, but is merely what the books term, 'evidence of negligence'—that is, to say, competent, but not conclusive evidence to be submitted to the jury on the question of negligence or no negligence. It seems to have escaped the attention of the judges who have laid down this rule, that it has the effect of clothing common juries with the Dispensing Power—the power to set aside acts of the legislature—a power exercised by the early kings of England, though its exercise was odious to our ancestors, so much so that the exercise of it disappeared with the Tudors. It was revived in this country by mere judicial assumption, when the judges, without any express constitutional warrant for so doing, laid hold of the power to set aside acts of legislation deemed by them to be opposed to the constitution. American public opinion has acquiesced in that assumption of judicial power; but the conception of submitting the question whether an act of the legislature shall or shall not be enforced, to the caprice of a common jury, is such a revival of the Dispensing Power as was never dreamed of by our ancestors, and such as sinks acts of the legislature below the grade of by-laws of corporations; for, although the latter can be set aside and disregarded in judicial administration when deemed unreasonable, yet it is always for the judge, and never for the jury, to decide whether or not they are reasonable."¹

The class of laws now under examination are those which merely provide a penalty in case of violation and do not expressly grant a right of action to a person injured thereby, nor state that violation shall be considered negligence.

¹ 1 Thomp. Neg., 2 ed. Sec. 11.

If either of these conditions existed there would be some justification for Thompson's diatribe. There are statutes, such as the Illinois statutes, authorizing ordinances regulating the speed of railway trains, and providing that when any railroad corporation shall violate the ordinance, it shall be liable to the party aggrieved for all damages.¹¹ Here the legislature has declared the law; it has made actionable what was before not actionable, and it would be "mere judicial assumption", such as Thompson condemns, if the courts held that in spite of the express provision of the statute no action could be maintained. But on the other hand where no such provision exists it is "mere judicial assumption" to construe the law as if it were there, and it is this latter class of cases that is under discussion.

The general canons of construction of such laws are as follows: A statute or ordinance providing a penalty for the violation thereof is a penal statute¹² and cannot be extended by implication or construction.¹³ Where a penalty is affixed by a statute to an act or omission such penalty is the only penalty or loss incurred by the guilty party.¹⁴ A law providing a penalty for violation of a speed limit creates a liability where otherwise none would exist, as the common law recognized no such limit, but required that under all circumstances the driver should exercise reasonable care,¹⁵ and where a statute creates a new liability it will be strictly construed.¹⁶ There is no question of any right of property being vested by the statute, but the doing of some act is prohibited under a penalty, and in such case the party violating the statute is liable for the penalty only.¹⁷ Therefore there seems no justification for holding that violation of a statute or ordinance constitutes negligence.

¹¹ *Chicago & R. Co. v. Crose*, 214 Ill. 602.

¹² *State v. R. Co.*, 133 Wis. 478.

¹³ 2 *Lewis' Suth. Stat. Cons.*, 2 ed. Sec. 521; *Van Buren v. Wylie*, 56 Mich. 501.

¹⁴ *In re International, etc. Co. L.*

R. 6 Ch. Div. 556; *Nottage v. Sawmill Phoenix*, 133 Fed. 979.

¹⁵ *Norfolk & R. Co. v. Ferguson*, 79 Va. 241; but *cf.* *Massoth v. D. & H. C. Co.*, 64 N. Y. 524.

¹⁶ *McFerren v. Umatilla Co.*, 27 Ore. 311.

¹⁷ *Sedgwick Cons. Stat. & Cons. Law*, p. 76.

There is another phase of this question which sustains this conclusion. If violation of a law alone can be the basis for the finding of negligence it follows that an action for negligence can be brought on such violation, and that it will not be necessary to state any other facts constituting negligence except the mere violation. In other words, the statute or ordinance would create by implication a right of action which did not exist before, but this is to give to statutes and ordinances generally an effect that is universally condemned.¹⁸ The general rule is, that no penal statute gives rise to a new cause of civil action¹⁹ unless it is expressly stated therein; and the rule is universal at the common law that no conceivable rate of speed is evidence of negligence,²⁰ much less negligence *per se*. Where a right of property is vested by virtue of the statute it may be vindicated by the common law,²¹ unless the statute confines the remedy to the penalty; but where the doing of some act is prohibited, the violator is liable to the penalty only.²²

An attempt is made by some courts and text-writers to establish a new rule; to distinguish between statutes enacted for the public benefit, where the duties enjoined are to the municipality or to the public at large, and those where the act was intended for the benefit of the injured person and other individuals²³ It is recognized by the great majority of these, even while holding that violation of a speed law is negligence *per se*, that no action will arise in case of the violation of statutes or ordinances generally²⁴ A person injured by reason of the failure of another to comply with an ordinance requiring sidewalks to be kept cleaned of snow or ice will be denied a right of action by the same court which will grant relief to one injured by another vio-

¹⁸ Sedgwick, *supra*.

¹⁹ Lewis' Suth. Stat. Cons., Sec. 521.

²⁰ Norfolk & R. Co. v. Ferguson, 79 Va. 241.

²¹ Lewis' Suth. Stat. Cons., Sec. 547.

²² Sedgwick, p. 341.

²³ Bott v. Pratt, *supra*; Taylor v. R. Co., 45 Mich. 74; Jackson v. R. Co. *supra*.

²⁴ Bott v. Pratt, *supra*.

lating a speed ordinance,²⁵ and the above stated distinction is given as the reason for denying relief in the former case. It is evident, however, that such a distinction is what Thompson calls "mere judicial assumption."

That this distinction fails not only legally but logically is shown by a denial of a right of action to one whose property was destroyed by the failure of another to comply with an ordinance requiring fireproof shutters on buildings²⁶ or to an employee injured by failure to provide safety appliances.²⁷ The line that the courts seek to draw is an invisible one; one sees it here, another sees it there, and while it is difficult to distinguish in principle between an action based upon a sidewalk-cleaning ordinance and one based upon a speed ordinance, it is impossible to distinguish between a fireproof-shutter ordinance and a speed ordinance.

II.

A failure to distinguish between a statute and an ordinance has been above noted as an important omission in many of the decisions, even by courts that have in other cases recognized such distinction. Even should the courts assume that a prohibition of doing some act under a penalty by the legislature is a declaration of the legislature on the subject of negligence, still it is apparent that an ordinance stands on an entirely different footing.²⁸ The legislative body of a state is invested with plenary power for all the purposes of civil government,²⁹ while the council of a municipal corporation can only exercise certain limited powers which are strictly construed.³⁰ It is undeniable that the legislature can make such laws as it sees fit on the subject of negligence. Whether it has done so in these speed statutes is another question; but even if it has there is no analogy between that case and one where an ordinance is

²⁵ Compare *Flynn v. Canton Co.*, 40 Md. 312, with *Phil. &c. R. Co. v. Stebbing*, 62 Md. 504.

²⁶ *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767.

²⁷ *Nottage v. Sawmill Phoenix*, *supra*.

²⁸ *Comm. v. Turner*, 1 Cush. 493.

²⁹ *People v. Fleming*, 10 Colo. 553.

³⁰ *Minturn v. Larue*, 23 How. 435.

municipal corporations will be found to consist in the right to enact and provide for the enforcement of ordinances necessary to protect life, health and property, to prevent and abate nuisances, to preserve and enforce the good government, general welfare, order and general security of the city and inhabitants thereof, and to enforce these ordinances and regulations by fine or imprisonment or both. Where the mode in which the power delegated to a municipal corporation on any given subject can be exercised is prescribed by charter or statute, that mode must be followed.⁴⁵ An ordinance is not a public law, but a mere local rule or by-law,⁴⁶ and the authority to make by-laws is a widely different thing from the general power to make laws.⁴⁷

The distinction between ordinances and statutes, though generally overlooked, has never been entirely lost. In an early case it was held that violation of a sidewalk-cleaning ordinance created no civil liability, as no power existed in the municipality to annex any such liability, and further, "If the liability exists under the ordinance in question, it exists *pari ratione* under every ordinance prescribing a similar duty.⁴⁸ In Pennsylvania it was held that an action cannot be based on a violation of an ordinance, and the effect of acts of a municipal council were distinguished from those of the national or state legislature.⁴⁹ In Maryland the court said in regard to the violation of an ordinance that the duty required was for the benefit of the public and "it is not like the case where an individual is bound by a private statute under which he derives a benefit."⁵⁰

When we have reached this point it seems too evident to require argument that the power in question is not delegable nor does it exist "by implication" or as an "indispensable" power.

To hold that violation of an ordinance is negligence is to

⁴⁵ *Brown v. Mayor, supra*; *Zottman v. San Francisco*, 20 Cal. 96.

⁴⁶ *State v. Fourcade*, 41 La. Ann. 717; *Mayor, etc. v. Swink*, 96 Tenn. 564; 1 *Dillon Mun. Corp. Secs.* 307, 366.

⁴⁷ *Com. v. Turner*, 1 Cush. 493.

⁴⁸ *Heaney v. Sprague, supra*.

⁴⁹ *Phila. & R. Co. v. Ervin, supra*.

⁵⁰ *Flynn v. Canton Co., supra*.

tion of knowledge of the ordinance and the knowledge of the violation thereof, there seems no good reason why the ordinance and the violation thereof should be considered at all in an action for injuries so far as any real negligence exists. It is difficult to justify this rule on any grounds and it seems less defensible logically than the rule that violation is negligence *per se*. If violation is not negligence, what is it? There is no half-negligence which, added to other half-negligence, constitutes full negligence. If one of the other facts to be considered was knowledge of the ordinance the rule could be understood, but that is never considered. The mere fact of the violation aside from knowledge of the ordinance has no bearing on the state of mind of the defendant which is the crux of the inquiry in case the violator has failed to inform himself of the ordinance. While that failure might be evidence of the defendant's state of mind, the violation of the ordinance in case of such failure would not.

As a matter of fact, an action based on violation of an ordinance is not one based on negligence, and it is erroneous and absurd to so entitle it. Of course, cases hold that violation of an ordinance is negligence *per se* or *prima facie* or evidence of negligence, but such language is misleading. There are three elements essential to the existence of negligence; (1) a duty owing from defendant to plaintiff, (2) defendant's failure to perform that duty, (3) injury to plaintiff from such failure.⁶⁰ The ideas of duty and negligence are strictly co-relative, and there is no such thing as negligence in the abstract.⁶¹ It is necessary that the party charged with negligence should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to his duty in a given case.⁶² But we never find the question raised as to whether the defendant knew of the existence of the law or not. He is presumed to know the law, or at least is held liable for all

⁶⁰ *McAndrews v. R. Co.*, 222 Ill. 232.

⁶¹ *Daniels v. Noxon*, 17 Ont. App. 206.

⁶² *Sherman v. Western Transp. Co.*, 62 Barb. 150.

violations of it, regardless of his knowledge or lack of knowledge, but this is not equivalent to saying that his violation constitutes negligence. It cannot be said that his omission to inform himself as to the law is negligence, as that fact is not established; nor is the contention tenable that he is liable for all the consequences of his acts (because a man is only liable for such consequences where there is a duty on his part, and negligence always connotes a duty), unless we admit the reasoning of those courts who hold that certain laws are made for the benefit of individuals as distinguished from the public or the municipality, and thereby by implication create a duty. And, as we have seen, there is no legal or logical basis for this distinction.

III.

The rule that violation of a law is negligence is sometimes stated in the form of a presumption.⁶³ If the rule can be sustained on this ground, it must be admitted it is a reasonable one. Presumptions, though generally applied to the common law, are occasionally applied to statute law,⁶⁴ though there seems to be no instance of their being carried into the realm of criminal and penal statutes unless such statutes are declaratory of the common law. It is apparent at a glance that there is more than one kind of presumption to account for; (1) where the jury are told that violation constitutes negligence *per se*,⁶⁵ and that they may base a verdict on the violation alone, and (2) where the jury are told that the violation constitutes negligence, but that certain other facts may justify the violation,⁶⁶ which other facts must be taken into consideration in rendering their verdict. These two presumptions cover all the cases which hold violation of a law to be negligence *per se* or *prima facie*; in fact all cases which permit negligence to be based on the mere violation alone. They are both "conclusive" presumptions in the strictest sense, though in the second

⁶³ Taylor v. Harwood, Taney, 437.

⁶⁴ Thayer Prel. Treat. Evid. 315.

⁶⁵ Jackson v. R. Co., 157 Mo. 621.

⁶⁶ Colorado Midland Ry. Co. v. Robbins, 30 Colo. 449.

class the courts appear to state a *prima facie* rule only. The presumption in this case can be met only by evidence excusing or justifying the violation, and not by evidence which rebuts the presumption by showing that the defendant was not negligent as matter of fact.⁶⁷ He may show, for instance, that he was going at a speed forbidden by the ordinance to escape from a runaway team that threatened his life; in this case the presumption of negligence still exists as a result of his violation, but its effect is null because the court considers he has offered a sufficient excuse. It is clear therefore in both of these cases that the presumption that violation of the ordinance creates negligence is conclusive because no evidence that the driver was careful is material, for the reason that the essential fact, his negligence, is already established by his violation.⁶⁸ If he can excuse or justify this act of negligence there will be no legal liability, but he cannot seek to avoid such liability by offering evidence of due care. He is not even permitted to show the unreasonableness of the ordinance.^{68a} There is a third class of cases, which permits the jury to take the fact of violation into consideration, but does not permit them to find negligence on that fact alone.⁶⁹ Here it is clear there is no presumption; but abandoning the third class an examination of the other two, which constitute a more or less logical species as distinguished from the third, may reveal some justification for basing the decisions in those classes on the theory of presumption.

No decision, however, has gone so far as to say that a judicial presumption is the foundation of the law laid down therein, and indeed the general rule is that negligence will not be presumed but must be proved like any other fact.⁷⁰ Nor can the doctrine of *res ipsa loquitur* be invoked to sustain the presumption, for that would be reasoning in a circle. It is assumed by implication that violation of the

⁶⁷ Colorado Midland R. Co. v. Rob-
bins, *supra.*; Riley v. Salt Lake R.
T. Co. 10 Utah 428.

^{68a} R. Co. v. Harrington, 131 Ind.
426.

⁶⁹ McGrath v. N. Y. C. & H. R. R.
Co., 63 N. Y. 522.

⁷⁰ 1 Thomp. Neg., 2 ed., Sec. 10.

⁷⁰ Swift v. Holoubek, 60 Neb. 784.

law constitutes negligence, but no court has examined the law of presumptions to see if its reasoning can be sustained on that ground.

Presumptions must have some basis;⁷¹ they must be logical and evidential,⁷² or they must be based on convenience or policy,⁷³ or they may have a combination of all these bases; that is to say, there must be some causal connection between the facts and the presumption based thereon such as would warrant or has warranted a jury in finding in the vast majority of cases from certain facts, X, a certain state, Y, or, as in the case of prescription, there must be a greater benefit derived from having a fixed rule of property than the harm done in individual cases by the lack of the presumption, or there may be difficulty in proving or disproving a fact to overcome, and the logically probable alternative is accepted in lieu of proof. In the case of violation of an ordinance no such conditions exist. As to the difficulty of proof it is evident that negligence can be proved like other facts,⁷⁴ and there is no rule of property in question, nor can it be said that a jury would be justified in the great majority of cases in holding that violation of a law constitutes negligence; that is to say, *real* negligence, because there are no data on which to base such a conclusion, and to assume this position *a priori* is to beg the whole question. To apply a conclusive presumption to cases where evidence proving or disproving the ultimate fact can be easily produced, where there is no rule of property involved, and no question of necessity or public policy, is to disregard all precedent. A "conclusive" presumption, as has been pointed out, is a rule of substantive law and is justified by public policy or the necessity felt by trained judges to control and guide untrained jurors.⁷⁵ The end justifies the means, whereas in case of violation of a speed law, neither reason, convenience nor policy requires that a presumption

⁷¹ See generally Thayer Prelim. Treat. Evid., 314 et seq.

⁷² United States v. Searcy, 26 Fed. Rep. 435.

⁷³ McCagg v. Heacock, 34 Ill. 476.

⁷⁴ Swift v. Holoubek, *supra*.

⁷⁵ Thayer Prelim. Treat. Evid., p. 212.

should be invoked. Presumptions sometimes offset presumptions,⁷⁶ but nowhere do presumptions offset actual and admissible proof of what is the point in issue; in this case negligence.⁷⁷ Thus a man is driving a horse in a place where an ordinance provides a penalty for a speed exceeding four miles an hour; the evidence shows he is driving at the rate of five miles an hour, a fair rate under the circumstances existing at that particular place and time, and in all of his facts he is exercising the highest care. If a presumption is proper that exceeding the speed limit is negligence, then it is apparent that such presumption destroys all the legally and logically probative evidence in the case on the question of the driver's negligence.

Again it is frequently stated as a rule of law, which perhaps is of universal application, that a presumption will not sustain another presumption.⁷⁸ As the question of the violator's knowledge of the ordinance is never raised, the presumption of such knowledge on his part must be the basis of his liability for violation of the law.⁷⁹ Then if the theory now under examination is correct, this presumption of knowledge is required to sustain the further presumption of negligence. Here is an unmistakable support of one presumption by another. And again it is held that where a person is injured by another while the latter is vio-

⁷⁶ *Lowery v. People*, 172 Ill. 466.

⁷⁷ It will be observed in regard to conclusive presumptions based on necessity or public policy that rebutting evidence is not admitted. In negligence cases, however, evidence of due care or lack of it is admitted, but it is denied any effect so far as rebutting the presumption of negligence arising from violation of the ordinance. This anomaly is owing to the fact that the cause of action is based on negligence generally, of which violation is but one phase (though as it turns out it may be the controlling one. Still the evidence is before the jury so that the analogy between these cases and those based on prescription or the question of knowledge of the law in question to that ex-

tent fails. *Cf.* *Thayer's Prelim. Treat. Evid.* p. 317. *Roberts v. Wabash R. Co.*, 113 Mo. App. 6.

⁷⁸ *Pennington's Exec'rs v. Yell*, 11 Ark. 212. *United States v. Ross*, 92 U. S. 281. *A. T. & S. F. R. Co. v. McFarland*, 2 Kan. App. 671.

⁷⁹ The true statement of this principle is that every man is liable for the consequences of his acts, but only when he owes a duty to the person injured thereby is he liable in damages to him. This throws us back on the question whether the ordinance creates a duty between individuals, a question we have already answered in the negative. This will be the case if all these so-called conclusive presumptions are regarded as rules of substantive law, as they really are.

lating a law, it may be presumed that the violation of the law was the proximate cause of the injury.⁸⁰ This latter presumption arises from the rule that where an act that is negligent in itself constitutes a part of the *res gestae* it will be presumed that it was the proximate cause thereof,⁸¹ on the theory that an act in violation of a statute or ordinance is negligent in itself. Thus it is seen that the presumption of negligence is sometimes the sustained presumption and sometimes the sustaining one, and in either case the rule or law of presumptions is violated.

IV.

An investigation of the manner in which the rules followed in the different States have developed would be interesting and instructive, but beyond the limits of this article. The rule that violation of a law is negligence *per se* (and this includes the *prima facie* rule) grows out of the idea that wherever a statutory duty is created any person who can show that he has sustained injuries from the non-performance thereof can bring an action for damages against the person on whom the duty is imposed,⁸² which statement is not true, and when its untruth as a general proposition is recognized a distinction is sought to be made between statutes enjoining duties to the municipalities or to the public at large and those enjoining duties to individuals,⁸³ a distinction which is not only illogical and impractical, but non-existent.⁸⁴ Then there are cases seeking to extend this rule to ordinances by assuming the similarity or identity between statutes and ordinances,⁸⁵ which likeness cannot be sustained on principle and is contrary to many well reasoned cases.

⁸⁰ *Shellabarger v. Fisher*, 143 Fed. Rep. 937; *Roberts v. Wabash R. Co.*, 113 Mo. App. 6; *contra*, *Hayes v. R. Co.*, 111 U. S. 228.

⁸¹ *Henderson v. R. Co.* 144 Pa. St. 161.

⁸² *Jetter v. R. Co.*, 2 Abb. Ct. App. (N. Y.) 458.

⁸³ *Jackson v. R. Co.*, *supra*.

⁸⁴ See dissenting opinion of Marshall, J., in *Sluder v. St. Louis R. T. Co.*, *supra*. Cf. *Heeney v. Sprague*, *supra*.

⁸⁵ *Jackson v. R. Co.*, *supra*.

The growth of the other rule that violation is only evidence of negligence (unless it means that while the jury are not to be instructed it is negligence *per se*, yet they may base their finding of negligence on that alone, in which case it is identical for our purpose with the negligence *per se* rule) may be seen in the State of New York where the court by failing to consider the questions involved sufficiently, threw itself into hopeless confusion and seems to have been guided in reaching its conclusions by a vague idea that the intent of the legislature was in some way involved.

In a case decided in 1860,⁸⁶ the Court of Appeals said that simple violation of a speed ordinance, unconnected with any actual negligence, involved the defendant in no other consequence than the payment of the penalty. The case only decided, however, that evidence of violation of the ordinance was not sufficient evidence of negligence on which to base a verdict against the defendant. This decision makes no distinction between statutes and ordinances and the reasoning applies equally to both, being based on the principle that where a law is passed prescribing a specific penalty for the violation thereof, there is no other liability thrown on the violator, unless such liability is declared in the statute, or unless the act which constitutes the violation was unlawful independent of the statute. This case was never followed and was at once subjected to criticism; the court refusing to apply the rule which it supposed had been decided therein, that violation of an ordinance is no evidence of negligence, although the earlier case had merely decided that violation of an ordinance was not sufficient evidence of negligence on which to base a verdict. In a later case⁸⁷ the question was raised as to the correctness of the charge of the trial court that defendant would be liable where the accident was the result of its violating a speed ordinance. It was held to be correct and the court said of the former case: "The case stands upon ground altogether too doubtful to justify its application to cases not

⁸⁶ *Brown v. R. Co.*, 22 N. Y. 195. ⁸⁷ *Jetter v. R. Co.*, *supra*.

strictly within it." It then proceeds to distinguish the cases, although it appears the distinction is not a real one. As to the Brown case the court said "it failed to recognize the axiomatic truth that every person while violating an express statute is a wrong-doer and as such is *ex necessitate* negligent in the eye of the law and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury notwithstanding any redress the public may also have," implying that an action would lie for mere violation, though that question is not directly decided. That there is no such axiomatic truth is shown by the unanimous approval of the courts of the doctrine laid down in the sidewalk-cleaning cases and others above cited even by courts which hold that an action will lie based on violation of speed laws.⁸⁸ In a still later case,⁸⁹ holding that violation of the ordinance was mere evidence of negligence, the New York court criticized the Brown case because it held that violation was not evidence of negligence (which was a mistake), and implied that an action would lie for mere violation. It further said: "Ordinances passed by municipal corporations pursuant to the powers of local legislation conferred upon them by the legislature have the same effect as laws in localities where thus adopted as if enacted by the legislature." This doctrine is true only in a limited sense and does not mean that an ordinance expressly or by implication declaring certain acts to be negligence or fraud is effective as a piece of general legislation within the limits of the municipality.

In a case⁹⁰ where the question was whether evidence of the violation of an ordinance requiring a flagman to be stationed at street crossings was admissible, the New York court held it was, because "a violation or disregard of the ordinance, while not conclusive evidence of negligence, is some evidence of negligence to be submitted to the jury

⁸⁸ Bott v. Pratt, *supra*.

⁸⁹ Belsegel v. R. Co., 14 Abb. Pr. (N. S.) 29

⁹⁰ McGrath v. R. Co., 63 N. Y.

522.

with all the other evidence." The positions are so dissimilar that within a year the court was compelled to acknowledge that it was an open question in New York whether violation of a speed ordinance was negligence *per se*, but held that at any rate it was some evidence of negligence.⁹¹ This seems to be the rule finally accepted.⁹²

In Missouri, an equally tortuous course has been followed by the courts. Lack of space, however, forbids an extended examination of the cases although it might be of interest. Any one who will take the trouble to read both the majority and dissenting opinions in *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, will see the predicament the court was placed in with two contradictory lines of decisions and that to cut the Gordian knot it was necessary for the court to expressly overrule five of its own decisions.⁹³ Careless presumptions and a failure to apply general principles of law led the court into this blind alley from which it refused to come out even when a light was furnished.

Some cases upholding this rule seek to justify it by declaring the law to be evidence of municipal or legislative expression of opinion as to what constitutes negligence,⁹⁴ but if this evidence is not conclusive and is only to be considered by the jury in connection with the other facts and circumstances, it is only what we may call half negligence, and this ground is indefensible. Suppose the jury were asked specifically as to what act or acts constituted the negligence, could they add this half negligence to another act, which in itself would not be full negligence, and make full negligence thereby? It is believed not, and yet unless they can do so the other act must constitute full negligence in itself, in which case the violation would be of no effect, or the violation must constitute full negligence, in which case the rule has no value.

⁹¹ *Massoth v. D. & H. C. Co.*, 64 N. Y. 524.

⁹² See *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488.

⁹³ *Fath v. R. C.*, 105 Mo. 537; *Byington v. R. Co.*, 147 Mo. 673; *Mur-*

phy v. R. Co., 153 Mo. 253; *Sanders v. Southern Electric Ry.*, 147 Mo. 411; *Holwerson v. R. Co.*, 157 Mo. 245.

⁹⁴ *Ubelmann v. American Ice Co.*, 209 Pa. St. 398.

It is believed the only strictly defensible position to take is, that violation of speed-laws in which a right of action is not expressly provided, is punishable only by the penalty stated and can not be made the basis of a civil action, can not alone sustain a verdict in an action for negligence, and is in fact no evidence of negligence; and that even if a statute providing a penalty for its violation can be regarded as creating a duty between individuals, this rule cannot be extended to ordinances on which most of the cases are based. It is evident, however, that the courts have deliberately turned their backs on this position, and it is further evident that they are likely to continue as heretofore in hopelessly divided ranks.

DENVER, COLORADO.

WM P. MALBURN.

THE INTERNATIONAL SOCIETY OF ESPERANTIST JURISTS.

The object of this article is to bring to the attention of bar of this country the very interesting subject of Esperanto, the international idiom of communication for and with all men. This important subject has never before been discussed in a legal periodical, and we are imperatively driven by the force of usage to speak of its merits as well as its usefulness for all purposes of legal endeavor. More specifically, it is intended in the following pages to explain the various purposes for which a new International Legal Association has been created—the International Society of Esperantist Jurists.

Incidentally, it will be necessary, in passing, to dwell upon the theme of international language, but it is not of importance to take up theoretical considerations.

The current legal opinion in this country and on the continent is that there is an urgent need for a new organization of lawyers, not a national association but international in its scope. The day for national enterprises has passed; we are living in an age that shows the international spirit manifested in a thousand and one ways, and the trend of modern thought induces the lawyer to submit to the growing demands of a new and higher civilization. The part the lawyer has played in international affairs has been immense. It was Rome that first formulated a system of laws adequate for the diversified relations of a civilized nation; we find, therefore advocates as a profession springing up during the early illustrious days of Rome. We are familiar with the growth of the *jus gentium*, and the *jus peregrinus*, the two bodies of substantive law which prevailed while Rome was a strong, centralized political factor. Many Greek orators were both lawyers and legislat-

ors and these had a very extensive knowledge of history and tradition. International law has its roots in the *corpus juris civilis* of Rome. The men who prepared the code of Justinian were cosmopolitans in sentiment. So should the lawyer of the twentieth century be.

In this country and in England the common law is in general use but in Europe the code is in full force. Judicial precedent is supreme with us, but on the continent the judges do not, as a rule, decide a case in accordance with a previous adjudication. Judge-made law is entirely unknown in the sense in which it is understood in this country. A practical problem attaches to each of these divergent systems, a problem to be solved by international jurists. The European lawyers can learn much from our system, and we can also derive much profit by acquainting ourselves with the system in vogue in Europe. This is precisely what the International Society of Esperantist Jurists aims to bring about, and its program is particularly fitted to accomplish this result.

To day we have reached an epoch in history that is characterized by the fact that the various nations are ready to labor in peace, harmony, and in union, to solve the problems which confront civilized man. It is not generally known to what extent the lawyer is laboring in this direction but it is perceptible that jurisprudence is not today what it has been. The growth in principles of international application is important and vital. Organization and unification is the pressing demand of the day and it is receiving due attention from various sources; the International Society of Esperantist Jurists is one of these sources and it emphasizes a growing need,—the need of an international association of active legal workers.

The International Society of Esperantist Jurists is a federation. A developed form of a federation is a cardinal point in the work of a nation. The need for an international organization or federation of lawyers has long been felt in Europe as well as in America. At the congress of

lawyers and jurists which was held in St. Louis, September 28th, 29th, and 30th, 1904, under the auspices of the Universal Exposition and the American Bar Association, the urgency of establishing such an international organization for lawyers was manifested. Various attempts have been made to establish an association that would enable lawyers in every country to converse easily in one common language but hitherto all labor in this direction has been in vain.

The Committee of Nations, in their report, offered the following resolution:

"Resolved, That this Congress, recognizing the importance of promoting friendly intercourse between jurists and lawyers of different nations, to the end that by harmonious effort they may labor efficiently for the improvement of the law, and the maintenance of international peace, request the American Bar Association to take such steps as are necessary to organize a permanent association of lawyers representing the different countries in the world, which shall meet at intervals to discuss legal questions of public interest, and that this resolution be transmitted to the secretary of the American Bar Association."

Never in the history of the world has the time been more favorable for the accomplishment and execution of all great international undertakings. In all parts of the world activity and bustle result in occurrences of world-wide note such as international movements and pan-harmonic undertakings. Organization is the order of the day. The international Postal Union, the international peace societies, the aeronautic clubs, tourist associations, cosmopolitan societies, arbitration conferences, educational institutions, mechanical enterprises on international highways, political juntas, Socialist conferences, Esperanto meetings, unification of special laws, regulations of waterways, etc.—these are but limited examples of the incorporation of the present-day international spirit.

Scientists are busy; educators are plodding; men of every walk of life are zealously working for organization for the purpose of enlargement and fructification, not within national borders but within international lines and spheres. The press agencies have long been international, the indus-

tries are being amalgamated, and the workers for international associations are increasing in number. The legal profession should organize on the basis of international comprehension and mutual understanding.

Esperanto is the name of an international language, a universal language and an auxiliary idiom all in one. It is a secondary language and is intended, in no way, to supplant any language now in use, being simply designed to enable one knowing his own language only, to communicate readily with foreigners also knowing their own language and Esperanto. It has been twenty-two years in existence and its creator was Dr. Louis L. Zamenhof, a prominent oculist of Warsaw, Russia. A congress of Esperantists held at Washington last August, 1910, at which official representatives from thirteen nations were present gave evidence of the great susceptibilities of Esperanto and in consequence Americans are learning it. Esperanto is an artificial language as indeed it must be when we consider how unsuitable, impracticable it is to make any living or dead language perform the role of an international idiom, one to be used, studied, propagated, officially sanctioned, introduced in schools, made obligatory in institutions of learning and gradually to become disseminated in every nook and corner of the world. Clearly such a language must be international and artificial in its construction.

The reason is in a nutshell. No nation is today so universally trusted and loved as to hope to have its language adopted as the international language, as the idiom for all men to speak. Special reasons are: (1) the adoption of the living language of any nation would give that nation such a predominance and supremacy over the other nations that would virtually make it the arbiter of affairs. (2) It would threaten every other language with destruction and bring about chaos. (3) It would not be an international language in the strict sense of the word, nor in any way be useful as such, for it would be too difficult to master; it

would be a language for scholars; there would always be a danger that millions of the world's inhabitants would not, could not learn it so as to write, read and speak it fluently, since they are not scholars by inclination or good fortune.

(4) It would not be universal for, while continuing to speak his own language in addition to the so-called international language, the user would be conscious that he is using a foreign language and not an international idiom.

(5) It would never be in extensive use because of lack of private initiative; it could not create that enthusiasm which pioneers must possess in order to do work which results in spreading the propaganda. Finally (6), the adoption of any living language as the international tongue would cause confusion because the time it would take to learn it would take away most of the time needed for more important occupations. These are the obvious reasons; they apply to dead languages with equal force.

An international language must be simple, flexible, euphonious, easy to learn—international in its makeup. Such a language must discard all irregularities, superfluities, and exceptions and reduce language within recognizable bounds, consistent throughout, and capable of serving the needs of the user for every conceivable purpose. Such a language is Esperanto. While hundreds of other projects have failed, Esperanto has succeeded because it has been rightfully conceived, properly and conveniently constructed, and extensively used and applied. It is international in its scope and tendency. The root words are taken from every language, dead and living, with the result that every learner recognizes most of them; similar root words existing in the various languages are taken as the basis of Esperanto. By the use of about thirty suffixes and prefixes and of about nine hundred root words or words, it is possible to build up as large a vocabulary as is needed to express ideas in everyday life. Technical words are taken as they are found in most of the languages and given the correct Esperanto endings; the entire grammar

can be learned in less than a half hour and remembered forever afterwards.

The most remarkable thing about Esperanto is that one can put it into immediate use on account of the very extensive utilization and application of which it admits for the attainment of international ends and objects. Associations without number exist for the study of Esperanto; others exist to enable the beginner and learner to put it into practical use. The former are national associations and are local in their nature; the latter are from every standpoint international associations. Of the former type is the Esperanto Association of North America; of the latter type is the International Society of Esperantist Jurists. Hundreds of Esperantist clubs, societies exist and are located in every country.

The history of Esperanto can be read in many periodicals and books devoted to Esperanto, having a two-column subject matter, one in Esperanto and the other in the appropriate language. It is a subject that should interest everybody. It made very little headway at first, like every good and worthy idea, but in more recent times its advance has been rapid and steady, and today it is spread and spreading in every part of the world. The number of periodicals printed in Esperanto alone is legion.

There is an Esperanto club in Paris numbering more than twenty-five hundred persons. Each succeeding year the number of Esperantists increases. Esperanto can be studied within so brief a time that it has every condition of practical success. If we look at Esperanto from the standpoint of an English speaking man, the following features will be noted: (1) a very large number of words will have a striking resemblance to English words; (2) we see similar endings occur every now and then suggesting the use of many prefixes and suffixes; (3) it resembles a living language, say Spanish or Italian; (4) it looks to be adaptable to words found in the dictionaries of every people; (5) there seems to be something ugly in the pronunciation

of words. With regard to the last point the difficulty can easily be removed. J's are used very frequently in Esperanto and the reader thinks it is pronounced as it is English, but it is pronounced as the English "y"; that is all. An Esperantist can tell instantly to what part of speech a word belongs; he knows on the spur of the moment that a sentence is bad if he cannot at sight locate the subject and predicate. Here is an excerpt in Esperanto with translation.

"Ghenerale oni pensas ke la leghoscienco estas pure abstrakta studajho kiu povas interesi nur la Juristojn. Tia opinio estas funde erara. Efektive la leghoj de la lando estas la videbla esprimo de ghiaj moroj; tial la studado de la leghoj estas la plejbona maniero havi kontakton kun ghi, por kompreni ghin esence kaj fundamente."

The translation is given literally in order to leave room for comment.

"Generally one thinks (or it is thought) that the law-science (jurisprudence) is purely an abstract study which can interest only the jurists. Such an opinion is deeply erroneous. Exactly, the laws of the land are the visible expressions of its customs; therefore the study of the laws of the land is the most good (best) manner to have contact with it in order to understand it in essence and in fundamentum."

The following words suggest English equivalents: *Gheneral*, general; *scienco*, science; *pure*, pure; *abstrakta*, abstract; *studajho*, study; *interesi*, interesting; *juristojn*, jurists; *opinio*, opinion; *maniero*, manner; *havi*, have; *kontakton*, contact; *esence*, essence; *fundamente*, fundamentum; all these call for no explanation.

A further effort enables many of us to suggest equivalents from some foreign language, especially from Latin, German, and French, which go to show the international basis of Esperanto.

Oni (Fr. we, it); pensas (Latin-think); legho (Latin-law); povas (Latin-power, ability); de (Fr-of); la (Fr. the); estas (Latin-is); nur (German-only); esprimi (Latin-expression); moroj (Latin-customs); bona (Latin-Fr-good); por (Latin-for); kompreni (Latin-understand);

Whenever we see a word ending in "e" we have an adverb as all adverbs invariably end in "e"; thus, *ghenerale*-generally; *esence*-essentially, *fundamente*-fundamentally; All nouns end in "o"; plurals are formed simply by adding "j" to the "o", making "*oj*", as in "boy". Thus *leghoj*-laws; *esprimo*-expression; *moroj*-customs; *studado*-study; *lando*-land; *maniero*-manners. All adjectives end in "a"; we have: *erara*-erroneous; *videbla*-visible; we likewise add "j" to "a" to make adjectives have the plural ending, conforming thereby to the noun ending, thus: *ghia* (root-word meaning it); *ghiaj* (its-plural number); *bona*-good, etc. We have used several compound words nicely put together. Thus, *videbla* is an adjective, "*vid*" being the root-word for "see", "*ebla*" being the adjective for the word "possible,"—combining we get the words "possible to see" or "visible." Also with *legho-scienco* suggesting "law-science" or jurisprudence; *studajho*—study is the root, *ajho* being the suffix, meaning anything pertaining to or having a certain quality; thus "*studajho*" signifies the subject of study or studies; *juristojn*: here we have the accusative ending "n" added to the noun ending "o", and the "n" comes last after the "o" in a plural noun.

In this last sentence jurists relates back to the word *interesi* (that jurisprudence can only interest jurists); the combination is of the root-word "*jur*" (law) and "*ist*" (a suffix in Esperanto denoting a given occupation or fixed calling)—*juristo* means "jurist" as in English. Were I to say that the present tense ends in "as", past tense in "is" and future in "os" so that "*pensas*" means "think", there being no number in verbs and that the infinitive ends in "i" as in "*interesi*," and to this add a little more, I should be giving you the other half of Esperanto.

The International Society of Esperantist Jurists was founded, as already said, to promote international intercourse between language-divided lawyers. It has an annual convention which takes place simultaneously with the International Esperanto Convention. Among the members

of the society are advocates practising in all the courts of every country from the Justice of the Peace court up to the Supreme Court. Advocates, barristers, special pleaders, Judges, notaries, law students, professors of law, law reporters, and law publishers are included among the members of the International Society of Esperantist Jurists. Many prominent advocates on the continent are enrolled as members. The officials of the organization are at present: President, Alfred Micheau, Boulogne, France; General Secretary, Paul Degon, Douai, France; and among the national vice-presidents are: Heinrich Arnhold, Dresden, Vice-President for Germany; Jules Brunet, Bruxelles, Vice-President for Belgium; Charu Das, Gorakhipur, Vice-President for Hindoostan; Lucretius Avellino, Rio de Janeiro, Vice-President for Brazil; Salvatore Ferrazini, Naples, Vice-President for Italy; P. Fewings, Queensland, Vice-President for Australia; Ruis J. Garzon, San Ferdinando, Vice-President for Spain; Marcel Laignier, Paris, Vice-President for France; Joseph Rajchmann, Warsaw, Vice-President for Russia; Van Sypriaan, Hague, Vice-President for Holland; Pasquale Didorono, Sofia, Vice-President for Bulgaria; Ritter Von Duniecki, Vienna, Vice-President for Austria; John Ellis, Vice-President for England; G. Monster, Copenhagen, Vice-President for Denmark; William Page, Edinburg, Vice-President for Scotland; Negreanu, Bucharest, Vice-President for Roumania; Alfred Letellier, Algiers, Vice-President for Algeria; F. Gentet, Geneva, Vice-President for Switzerland, and William E. Baff, Washington, Vice-President for the United States.

The International Society of Esperantist Jurists is in fine shape and in good working order but it is only a shade of its future growth. It is easy to suggest in how many different ways the society can be built up into an international society able to command the attention and respect of the entire world. It is not too much to expect that the various bar associations will take the initiative in the for-

should study Esperanto and become a member of the new international association. It may not have a present pecuniary value to him—it may not be essential to study it and use it and the services of our organization in order to practice the profession, give legal advice, attend the courts, and to this extent form no part of the lawyers legal education, but it is surprising that every lawyer who has become a member of this international society has helped to contribute articles in Esperanto, or helped to prepare the Esperanto law dictionary thereby becoming enthusiastic in his work as an advocate. The environment,—the international environment in this case—has worked wonders.

Esperanto will be useful in the courts for it will be possible to do away with the expense of hiring interpreters as soon as Esperanto is taught in all the schools of the world. Then the proceedings could take place entirely in Esperanto.

Lawyers can by using Esperanto bring about some of the greatest reforms in the law, modifications embracing the legal systems of all the nations, such as uniform bills of exchange, uniform and universal banking laws and patent laws. In the latter case especially, will the importance of using Esperanto be perceived; by dint of his very specialty every patent lawyer, every admiralty lawyer and practitioner in the Federal courts should be a member of the International Society of Esperantist Jurists in order to place the organization on a still higher footing and practical basis. The necessity of engaging the assistance of foreign attorneys in cases involving issues between citizens of this country and other countries where special confidence must be reposed impels every Federal practitioner to study Esperanto and have interrelation with able members of the I. S. E. J. Judging by the small length of time necessary to master Esperanto, and the results possible to be achieved, no one can fail to be convinced as to the advantages which Esperanto presents to the members of the Federal bar.

Every law student should study Esperanto, should organize clubs and societies in order to become a member of the International Society of Esperantist Jurists. Many have availed themselves of this opportunity in Europe. Law students have every advantage over their more experienced brethren—and knowing Esperanto, they will be the first participators in the new civilization that will make Esperanto an important factor.

Contact with the I. S. E. J. will elevate professional conduct by acquainting the members of the International Society of Esperantist Jurists with the codes of legal ethics prevailing in every country. This is very important. At the Universal Congress of lawyers which was held at the St. Louis Exposition topics of this nature received large attention, and a desire was expressed for more active labor in this direction. Esperanto is an excellent medium for large gatherings of lawyers, not only in international congresses but in national assemblies as well, because of the ability to diagnose favorably all international movements.

Self sacrifice is not necessary in order to study Esperanto,—the learner is no longer a pioneer; the generation of the pioneer is almost by. The learner is only called upon to use it. Innumerable applications have been made and can be made by every Esperantist. The influence which will come with increased membership is most remarkable to behold. The activity in one country will react in other countries when the results are announced, and this influence will also spread within healthy bounds.

A fair trial will convince anyone of the utility of Esperanto for every species of legal work.

The law is an expanding science, the framer of the law, the interpreter, and the appliers—all have a hand in shaping future legislation. All should, therefore, acquire the comparative method of international research obtainable only through the medium of Esperanto. Translations of foreign statutes, if made in Esperanto, would result in a great saving of time and energy.

The unification of the excellencies of the common law and the Corpus Juris Civilis will be brought about by Esperanto in the course of time. Neither system will be supplanted—both will become harmonized and invigorated thereby. There must follow legal changes as soon as the advocates of one country, looking for needed legislation in other countries find the need anticipated in a foreign country and avail themselves through Esperanto to receive the information required. In this way, it is to be noted, it will be possible for lawyers using Esperanto to receive information on all legal topics of interest directly from the original foreign sources. Private reports will be exchanged between the lawyers of the various countries.

Union is strength; the lawyers all over the world should unite. A slight effort that could not, would not interfere with the daily work of the advocate is all that is demanded. The time required to master Esperanto is very short! to use it, the field is unlimited. The best argument for taking it up is the individual results to be achieved. The International Society of Esperantist Jurists invites the assistance of every lawyer to build up this world-wide organization in this country and the Vice-President for this country will take the matter in hand with the bar associations. Good counsel and association with lawyers in every state in the Union is needed and expected.

WASHINGTON, D. C.

WILLIAM E. BAFF.

RATE REGULATING BODIES AND THE POSTAL SERVICE.

If the question was asked of the many commission and rate regulating bodies of the several states; those bodies which have superintendence and control over public service corporations; "What authority have you to make rates on mail matter?" the answer would likely be uniform and unanimous and consist of the single word, "None."

Yet, perhaps for the reason that the question has never been presented and considered by such bodies, they are continually either making or attempting to make, are enforcing or attempting to enforce, or are passively allowing rates to be collected and practices followed within their several jurisdictions which in effect very materially operate to make rates upon mail matter and which at the same time very materially operate to create the unfortunate and indefensible condition of an annual deficit in the operations of the postal department of our common country. A deficit of millions. A deficit which the people of the whole country pay. A deficit which while it may be augmented on account of other matters is most largely created by the rates and practices herein set forth. A deficit which seriously retards the proper development of this most useful agency of the general government.

Right here it perhaps occurs to rate-making commissions that this is no affair of theirs. But it is an affair of theirs. They are citizens of the United States of America. This is our government. This is our postoffice. If there is anything that such bodies can do to hasten the day when the present unfortunate condition of the postal service will be remedied, it would appear to be one of their most pleasurable duties and of the highest concern to every citizen. It is contended that there is such a way; that it will not con-

flict with any duty to any state or conflict with the laws of any state. Let us briefly consider the question.

The postoffice is a public establishment, instituted for the purpose of performing such public service with relation to carriage and distribution of mail matter as it may, by law, be authorized and required to undertake. Long before the present Constitution was adopted, the postal service was established in this country. Its early conception and activities embraced very much the same service as it is now permitted to perform—the carriage of intelligence—letters—and the transportation of small portable goods, later, it came to embrace the carriage of newspapers and periodicals. In 1672 a postal service was put in operation between Boston and New York by Francis Lovelace, Governor of New York. Writing to John Winthrop, under date of December 27, 1672, he says: “I herewith present to you two rarities, a pacquett of the latest intelligence I could meet withal, and a post . . . this person that has undertaken the employment I conceived most proper, being voted active, stout and indefatigable . . . I have affixt an annuall sallery on him, which, together with the advantage of his letters and other small portable packes, may afford him a handsome livelyhood.”¹ Of the initial trip of this first post the Memorial History of New York says:² “It is recorded as creating great excitement in the little village of Harlem when that first postman drew up at the tavern door to refresh himself, as he undoubtedly did, with some good home-brewed Harlem beer—his ‘port mantles’ (portmanteaux) crammed with ‘letters and small portable goods,’ the ‘locked box’ in the office of the colonial secretary accumulating the next month’s mail, and what he had brought being carried to the ‘coffee house’ to be ‘well-thumbed’ until called for.” As we shall later see, this early conception of the legitimate field of the postoffice—the transmission and delivery of public intelligence—newspa-

¹ Broadhead’s History of New York, Vol. 2, 196-8.

² Vol. 1, 355-6.

pers—the “comforts of friendly correspondence”—letters—and the carriage and delivery of “small portable goods”—a limited parcels post—was faithfully adhered to by the people of this country for about two hundred years, both in law and practice.

We shall have occasion to later find that the postal business was early regarded as a proper governmental monopoly and that it was considered both reasonable and necessary that the general government should have and exercise the sole duty and responsibility of providing ways, means, and facilities for the carriage of the mail and at the same time be entitled to and receive all the emoluments and profits growing out of the performance of that service—that all mail matter should pass through the postoffice and be subject to its tolls—postage. When in 1691, William and Mary farmed out by royal grant the right to establish and maintain a postal service in the American colonies for the term of 21 years, they used the following words: “Thomas Neale Esq. is hereby granted full power to erect, settle and establish within the chief parts of their majesties’ colonies and plantations in America an office or offices for the receiving and dispatching letters and pacquets and to receive, send and deliver same . . .” “Letters and pacquets” what a fateful and interesting term. “Pacquets” is now in the law as “packets” and “letters and packets” is rather an old-fashioned term for the more modern “mail matter.”³ In the early days, no limit was made in the law as to the weight of “packets” which might be sent by post, so we find the postmaster general, in 1799, writing to Congress and urging that a weight limit be fixed on packets; saying that in consequence many “packages” had been sent which those to whom they were addressed had refused to take up on account of the expense.

“Letters and packets” is a phrase which has always been synonymous with the term “mail matter” in postal

³ United States v. Huggett, 40 Fed. 638-40. “Revised Statutes, Sec. 3981, ‘packet’ means any package which

is mailable, such as merchandise and not necessarily a bag of letters.” U. S. v. Blackman, 17 Fed. 837.

law and postal history. "Letters" meant the same thing that the word means today, while "packet" or "packets" meant all other mail matter. The rates of postage as defined by the early acts of Congress make this clear. "Letters" were rated by the sheet—there were no envelopes in those days—so a letter of one sheet took so much postage while a letter of two or more sheets paid more. "Packet or packets" of other mail matter was rated by the ounce as it is today. And what is equally important, at first, there was no limit to its weight, an unlimited parcels post.⁴

The Neale patent was bought back by the English Crown in 1710 and from thence the post in this country has always been considered and conducted as a public agency.

It has a few times since been suggested that the postal service could be best administered in private hands, but so far as we can find only once was ever such a query asked in the Congress of the United States.

Congress asked the committee on postoffice and post roads to "inquire into the expediency of abolishing the postoffice department; and if it deems it inexpedient, that then they report on the propriety of repealing all laws that restrain individuals or corporations from carrying mails or mail matter," and on January 21, 1859, the committee reported that it would be "inexpedient" to do either of these things. So we learn from this that in 1859 there were laws which forbid the carriage by other means than the mail of any "mail matter;" that there was at that time a law which forbid private agencies from carrying mail matter.⁵ Congress had just eleven years before that passed an act which was intended to forever settle any doubt on the question of the power of Congress to forbid the carriage of mail matter by other agencies than that afforded

⁴To find the early rates and the early definitions of mail matter you should read: English Statutes at Large, Vol. 12, 115; Vol. 26, 249. Henning's Statutes at Large (Virginia), Vol. 3, 112-15. Act of New York Colony, passed November,

1692. Mass. Historical Collections, 6th Series, Vol. V, pp. 52, 101, 116, 140. Senate Doc. No. 542, 61st Cong. 2 Sess.

⁵See report No. 135, 35th Cong. 2 Sess.

by the postal department and at the same time to announce the view of Congress as to the wisdom of such procedure. Congress determined both of such questions in favor of the power and the right of such a course.

The agitation over the private carriage of mail matter by express companies and others was constant and of prime interest for many years before the passage of the law mentioned. The subject was considered by a committee of Congress.⁶ This committee reported that "further legislation (is) necessary to protect the public service, and presents a question no less momentous than this: *Whether the constitution and laws of the country or a lawless combination of refractory individuals shall triumph?*" This committee was writing about the violations of the spirit of then existing laws by the express companies of that time. They urged the passage of more comprehensive laws; such laws were passed and yet continue in our law. This report is a vigorous one and should be read in its entirety.

The postal service is a natural governmental monopoly. Such monopoly should be complete. Under the law such monopoly is complete, allowing certain exceptions considered proper in the wisdom of Congress. Early legislation recognized this principle and later legislation has emphasized it. "*The business of carrying letters and other mail matter belongs exclusively to the government.*" Thus speaks the Attorney General of the United States on June 3, 1858. This opinion is reported in 9th Atty. Gen. Op. 161, and this opinion is quoted with approval by the United States Court in the case of *Blackham v. Gresham*.⁷

"No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mallable packets. The policy of such an exclusive system is a subject of legislative, not of judicial, inquiry. But the monopoly of the government is an optional, not an essential, part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly. When it is legislatively established, it

⁶ H. R. Rep. No. 228, Fed. 28, 1844. Gen. Op., 152; 21st Atty. Gen. Op.
⁷ 16 Fed. 609. See also 14th Atty. 398.

may include one or more without embracing all of the subjects of the government's postal arrangements. The business of private carriers of letters and mailable packets, even on the principal mail routes, is lawful unless legislatively prohibited."

Thus spoke Judge Cadwalader, in the case of *United States v. Kochersperger*.⁸

Now, let us see whether or not the government has, as a matter of legislative policy, determined that the postal service shall enjoy within legislative limits a monopoly in the carriage of mail matter—all mail matter—all letters and packets which are by law mailable, permissible to go in the mail.

The exceptions from the monopoly of the postal service as created by legislative authority are:

(1) Common carriers may carry otherwise than in the mail, letters or packets, relating to the merchandise under their control, or respecting the current business of the carrier.

(2) You may send a letter or packet by a friend without compensation, or by a messenger employed for the particular occasion only.

(3) Certain matter may be sent by private express, provided you place thereon the requisite amount of stamps, necessary to carry the same by mail and cancel same. This is to give you an opportunity of sending diamonds or thousand-dollar bills, or other extra valuable matter, by private express and get any extra security afforded by express companies and at the same time the government gets its revenue by the cancellation of the proper amount of stamps.

Congress gets its authority in postal matters from the ten words in section eight of the Constitution of the United States; reading: "The Congress shall have power: To establish Postoffices and Post-Roads." Since the establishment of the government, this grant has always been taken to mean that thereby Congress is invested with the exclus-

⁸ Fed. Cases. No. 15,541.

penal or criminal code which went into effect January 1, 1910.

Now, let us not become confused over the use of the phrase "mailable matter," as used in the Congressional definition of matter of the fourth class and conclude that it means that Congress has simply made it permissible that such matter might be sent in the mail; that the sender had his choice of agencies. The same words are used in defining mail matter of the first and second class, while the words "mail matter" are used in the same sense in defining matter of the third class, instead of the words "mailable matter." "Mailable matter" and "mail matter" are used as interchangeable terms in the acts of Congress relating to the postal service.

Now what are the existing provisions of the law which are intended to protect the revenues of the postal department and to make it unlawful to carry mail matter over a post-road for hire, except it is carried as a part of the mail, or falls within the exceptions provided in the acts of Congress?

Section 181 of the new criminal code of the United States, effective January 1, 1910, provides:

"Whoever shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, to any other city, town, or place, between which the mail is regularly carried, or whoever shall aid or assist therein shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both: Provided, that nothing contained in this section shall be construed as prohibiting any person from receiving and delivering to the nearest postoffice, postal car, or other authorized depository for mail matter, any mail matter properly stamped."

This is in the terms of the old law as amended in 1879; is the law of 1848, re-stated to modern conditions; the civil liability of \$150, under the old law being changed to a

fine of not more than \$500, with possibility of imprisonment.¹³

In defining what is unlawful to be carried by private express it says "letter or packet"; in noting the exceptions, the term "mail matter" is used. Both terms appear in the same section. They are used in a number of other sections of the new code in the same connection. The opinions of the attorney general hereinbefore cited as supporting our contention and the cases cited from the courts of the United States are set out in the annotations appearing alongside section 181 of this code, in the official authorized publication thereof.

Other sections of this code use the same phraseology and manifestly are designed to meet other phases of the unlawful carriage of mail matter. Such is the provision against any carrier transporting any agent of such unlawful express engaged in the unlawful carriage of letters or packets; the inhibition against any person sending any letter or packet by such express; making it unlawful for any carrier to carry any letter or packet except as a part of the mail, etc.

To say that the word "packet" in these statutes is surplusage, or that it means nothing, or that it does not mean and does not include all other kinds of mail matter not included in the term "letters," is to accuse Congress of carelessness in the use of words, an imputation which Congress would doubtless resent. If the word "packet" as used in these statutes does not mean and was not intended to mean and to include all other mail matter not included in the term "letter" then what does it mean? Certainly, it cannot be considered as intending to mean the plural of "letter." Had Congress intended any such meaning, why resort to such unusual methods; why violate all laws of good diction and accuracy in terminology in such an

¹³ See also Secs. 200 and 203 of New Criminal Code of N. S. Sec. 200 used the term "letter or pack-

age" while Sec. 203 says "letters or other mailable matter."

unusual way? It would appear that there can be no doubt that these statutes first passed in 1848; re-enacted in 1872 and since remaining in the laws of the land and now solemnly re-affirmed in the new penal code, were and are intended to effectually and for all time assert the monopoly of the postal department of the general government in the carriage of all mail matter as well as the wisdom of such monopolistic carriage. Especially would this seem to be a correct interpretation of these statutes when it is conclusively shown that these laws were first made to meet the very conditions of competition by private expresses, existing at the time of their enactment.

They are then the supreme law of the land. The duty of all good citizens is then plain. Such should lend their every aid and encouragement to the enforcement of the law. Only by their full enforcement can the people of the whole country come to know and understand their effect and then in the light of experience we shall come to know of a certainty whether or not we want the limits of the postal monopoly extended to include a larger weight of packets or whether we want such limit reduced.

The oath of office of the commissions and rate regulating bodies of the several states binds them to the support and enforcement of these statutes. Their plain duty can not be escaped by the imputation that this is the duty of the postoffice department and that is lax and inactive. Prior to 1881 the postoffice department was zealous in the enforcement of these statutes and we had few and small postal deficits. It remains to be seen what this department will do with the law effective January 1, 1910.

The neglect or failure of others can not excuse our own lack of performance of our duty.

The several states in agreeing to the national constitution gave Congress this power over the whole postal establishment and committed to Congress the duty of determining its limitations. The Congress has acted. It would appear to be highly improper for the states, or any officer

or officers thereof, to impede or hinder the enforcement of the postal laws of Congress.

In most states there is some body which has jurisdiction over common carriers. Express companies are daily within the confines of every state carrying mail matter in defiance of law. So far we have not been able to ascertain that any state commission having jurisdiction over express companies has affirmatively ruled upon this question and directed or fixed rates at which express companies might carry mail matter within the confines of such states. Certainly no such commission should do so. If a commission of a state can make rates for mail matter passing within its confines then a state can establish a postal service in opposition to that of the general government. May a state set up a postal system? To ask the question is to answer it. The right to make rates on mail matter was a long time ago by the adoption of the constitution committed to Congress. Congress has exercised such right without serious question for more than one hundred years.

Until Congress shall determine that it will restrict the activities of the postal service to letters and periodical publications, we maintain that it is the manifest duty of all good citizens and especially those in office and of power over express companies to see that such agencies do not violate the law within their jurisdictions by the carriage of mail matter between points and places within such state.

The Interstate Commerce Commission derives its power from an act of Congress passed in 1887, later amended so as to include express companies. Such commission has lately excused its consideration of express rates involving rates for the carriage of mail matter on the ground that such handling by express companies of such matter and the filing of tariffs relating thereto did not violate the act which such commission administers and certified a copy of the record to the Attorney General, March 8, 1910.

Thus we have Congress, the Interstate Commerce Commission and the rate regulating bodies of forty-six states

making rates on the carriage of mail matter, money letters, packets, newspapers, magazines and other printed matter.

The responsibility for this chaotic jumble must lie somewhere. It is a jumble allowed by ignorance or worse. In 1844, just after express companies were started and while their competition with the postal department was new, it was the opinion of those competent to judge that such competition cost the postal service at least one-third of its revenue. Doubtless fifty thousand dollars daily is not too high a figure to place upon what such competition now costs the people of the country. But it may be remarked that as these transportation expenses are not paid to the postal service but paid to express companies at, in most instances, a rate less than postal rate that the whole people are ahead. This consideration does not take into account the fact of postal deficits, so as we pay the deficit and the express companies at the same time we are paying our postage bills twice, besides delaying improvements and extensions of the service to the good of the whole people. In my judgment, so far, the responsibility for this unhappy situation in postal conditions does not lie with Congress. Congress so far has never taken a backward step but there are some jokers concealed in the provisions of the pending postal re-organization bill; some phrases which would repeal the provisions of the Federal Criminal Code. All the power and jurisdiction Congress has over commerce, its agencies or instrumentalities, is to be found in the "commerce clause" of the constitution, supplemented by the "post roads clause." These clauses of the constitution are not opposed to each other, but rather supplement and aid each other. The commerce clause has limitations, the post roads clause has no limitations. They are each distinct and plenary grants of power to Congress. It lies with Congress to determine the bounds or limitations of each of these powers. Congress has made certain matter of commerce mail matter and thereby committed its carriage over post roads for hire (all railroad lines are post roads) to

the mails long before it dreamed of an interstate commerce commission. In determining the bounds of the postal system, Congress has under the post roads clause of the constitution built up a great postal service, reaching to the uttermost confines of the country, daily serving, as no other agency could, the most isolated inhabitant as well as the populous marts of trade and commerce.

I cannot believe that Congress ever intended to give to the Interstate Commerce Commission any authority to enquire into or make rates on mailable matter carried interstate by express companies or other carriers. To permit the Interstate Commerce Commission or any other rate making or rate regulating body to make rates upon mail matter is to supercede and set aside the work of Congress on the same subject; it is in effect to repeal the laws of Congress, an unheard of proceeding. The effect of such action is to make havoc and create chaos or worse in the administration of the laws governing the postal service.

Besides, the rate making principle which has for many years governed Congress in making postal rates is squarely opposed to the principles and methods used by express companies. Congress says that as to mail matter we shall have one rate for any distance; the same rate for all distances; while express companies make rates in most any old way, depending upon competition, distance, volume, and many other factors. If you prepay, the rate is one thing; if collect, a different rate applies. Their rate in one direction is usually different from the rate on the same line in the other direction.

The express companies charge \$2.15 for an eleven-pound package from Washington, D. C., to San Francisco, while the American Express Company will carry the same package from New York to San Francisco for the British postal system for sixty cents. For this contract which has been in existence since 1902, see H. R. 2189, 61st Cong., 3 Sess., issued Feb., 1911.

To clear up this situation and put an end to these flag-

rant floutings of the rights of our people, it is only necessary that a plain common-sense interpretation be made of sections 181, 200, 203 of the New Penal Code of the United States, and that these laws be enforced. Section 181 relates to carriage of mail matter by private express and uses the term "letter or packet." This section applies to the operations of express companies over post roads within the confines of the boundaries of the United States. Section 200 of code relates to the carriage of matter by ships plying between American ports, such as New Orleans and New York and this section of the code uses the term "letters or packages." Section 203 of code relates to ships plying between foreign and domestic ports and this section uses the term "letters or other mailable matter."

Will any one for a moment contend that Congress meant to impose restrictions on foreign vessels carrying mailable matter to this country, or to impose restrictions upon domestic vessels plying between domestic ports, which it did not intend to impose upon the express companies operating over the post roads of the United States? There may be such persons but I have not yet the hardihood to be one of them.

It is earnestly submitted that in the pending postal reorganization bill that Congress should put an end to these quibbles; that state rate-making bodies, whether commissions or legislatures, should see to it that no express company operating within their jurisdiction shall have any tariff or rates for the carriage of mail matter between points and places within such state.

Let each citizen and official do his full duty and this great public agency, the postoffice, will yet again be restored to the lines of its founders; there to remain a beneficent public service, carrying comfort and profit to the whole people and all "without the cost of a dollar to the public treasury."

FAYETTEVILLE, ARK.

NATHAN B. WILLIAMS.

notes for foreign lawyers. In 1907, Mr. Baff was, among others in Europe, instrumental in organizing the International Society of Esperantist Jurists (I. S. E. J.). He has translated in Esperanto the Code of Legal Ethics adopted by the American Bar Association, which is now being printed by instalments in "*La Revuo*," the official organ of the I. S. E. J., published at Paris. He is also engaged simultaneously with European members of the new international jurist association in preparing a legal standard dictionary for general use among lawyers knowing Esperanto. Besides being vice-president of the I. S. E. J. for this country, Mr. Baff is counsel for the Universal Esperanto Association of Geneva, Switzerland, having delegates in every large city in the world.

NATHAN B. WILLIAMS, the writer of "State Regulating Bodies and the Postal Service," is a native of Arkansas and has been a practicing lawyer at Fayetteville in that state since 1894. He served three terms as United States Commissioner for the Western District of Arkansas and in 1907 began an investigation which convinced him that the laws were being violated by express companies carrying mailable matter. He has written a number of articles in the various magazines on this subject.

LORD CHIEF JUSTICE ALVERSTONE: Lord Alverstone, Chief Justice of England, was born in 1842, the second son of Thomas Webster, Q. C., and was educated at King's College School, the Charterhouse, and Trinity College, Cambridge. He was called to the bar in 1868 and at the age of 36 became a Queen's Counsel. He was elected to Parliament from the Isle of Wight in 1885, becoming soon after attorney-general of England, a position which he held until 1900, when, after a brief tenure of the Mastership of the Rolls, he was elevated to his present high office and created a Baron of the United Kingdom. As Sir Richard Webster, attorney-general, he became well known to the bar of the United States, as British counsel in the Behring Sea and Venezuela arbitrations, and as Lord Alverstone and as one of the judges in the Alaska boundary dispute that decided the case for the American contention, he is entitled to our respect and regard. He is one of the great judges of the age and it is to be hoped that he may before long be able to accept the welcome and hospitality of the American Bar Association, as two of his predecessors, Lord Coleridge and Lord Russell, did in their day. His portrait in this issue is presented to our readers with the permission of the photographers, Messrs. Elliott & Fry, of London.

THE CENTENARY OF THE FRENCH BAR.—It seems rather strange that in so old a country as France the Centenary of its bar should have been celebrated only last December. But the old

cates who found fame and fortune within easy reach. In the thirteenth century the first attempts were made at a system of regulation. Barristers were required to swear that they would only take up just causes; their fees, proportionate to the importance of their cases, and being fixed by the judges, were never to exceed the then equivalent of £27 and an ordinance of the year 1277 restricted the length of speeches, forbidding repetition and allowing the advocate only to supplement what his *confrères* had said if he had something really essential to add. Philip the Hardy was the author of this ordinance.

The history of the French Bar is interwoven with the history of Parliament. In the most ancient times, in fact, Parliament was recruited from the bar, and the most eminent magistrates—DeThou, Séguier, Pasquier—had first been famous barristers. When the Parliaments were exiled, advocates closed their chambers, and when the magistrates were recalled the advocates returned in triumph with them. In their pursuit of equality by the abolition of all privileged corporations the Constituent Assembly did not overlook the bar. The order was suppressed, and every citizen who had made the necessary studies was allowed to follow the profession "without having to account for his conduct to any but the law." Although some illustrious advocates—Tronchet, Duport, Treillard—were in the Assembly they dare not, or would not, protest. There was one, however, who possessed the courage to attack the project—Robespierre—but his counsel was disregarded, and the Order of Advocates was abolished by the laws of the 16th Aug. and the 2nd Sept., 1790.

About a hundred advocates, however, while accepting the new designation *hommes de loi*, founded a free society which preserved the customs and discipline of happier days. They dissociated themselves from the new comers, who were often without capacity and not infrequently without morals.

A regrettable failing, however, was shown in certain quarters. Selected by Louis XVI. to defend him, Target declined on the ground of his age and weariness, and Tronchet only accepted the task with bad grace. But, indignant at these unlooked-for defections, many advocates spontaneously offered to defend the unhappy monarch. Berryer *père* relates in his *Souvenirs* that Tronson-Ducoudray assembled a large number of *confrères* at dinner one day. It was then resolved to form a defensive league. If the choice of the King fell on any one of them, all would lend their aid. Even the line of defence and the exordium were decided on. Leading counsel for the defence was to say, in substance: "J'apporte à la Convention la vérité et ma tête. Elle pourra disposer de ma vie quand elle aura entendu mes paroles." But, as it turned out, none of these resolute advocates were called. Tronchet and the venerable Lamolignon de Malesherbes, whose spontaneous and generous offer the King accepted, asked for the aid of a third counsel. The King designated De Sèze, who acquiesced without hesitation and read his pleading before the convention.

Little was needed in those days for a man to be sent before the Revolutionary Tribunal. Malesherbes carried his head to the scaffold, and Tronchet and De Sèze only owed their salvation to flight. Yet these happenings failed to intimidate the advocates of that day. Tronson-Ducoudray defended Marie Antoinette, and Chauveau-Legarde Madame Elisabeth, the Girondins, and Charlotte Corday.

But the defenses made by these advocates soon became intolerable to the Tribunal of Blood, and a law of the 11th June, 1794, reorganized the Revolutionary Tribunal in such manner that henceforth there would be but one sentence—death. "No more advocates!" said art. 16. "Calumniated patriots will be defended by patriotic juries; conspirators will have no advocates for the defence."

Napoleon, when First Consul, undertook to raise up a new society on the ruins of the old. Having drafted the regulations of general adminis-

tration, he occupied himself with the reorganization of the judiciary. The tribunals and the law colleges were successively established. The First Book of the Civil Code was promulgated, soon to be followed by the Code of Commerce, the Code of Criminal Investigation, and, finally, the Penal Code. At length came laws for the recognition and protection of advocates, but at this juncture the order was not yet re-established. Subsequently Cambacérés submitted a project to Napoleon involving this concession. But the Emperor, although he held consultative advocates and jurisconsults in high esteem, professed disdain for pleaders, and he scribbled at the foot of the project this comment: "These proposals are absurd, and leave no room for action against advocates, who are the artisans of crime and treason. I will never sign such a decree as long as I have the sword at my side. I wish we could cut out the tongue of any advocate who uses it against the government."

However, the project was amended, and on the 14th Dec., 1810, appeared the decree re-establishing the Order of Advocates "as one of the means calculated to maintain probity, tact, disinterestedness, desire for conciliation, love of truth and justice, and enlightened zeal for the weak and oppressed."

LAW REFORM—THE COURTS RECOGNIZE THE CALL.—The cry for speedier and more certain justice is reaching the courts; the demand that technicality shall not obscure the real issue is finding already a response by more than one appellate judge and in more than one appellate court, and public opinion is beginning to make itself heard, and is inducing some of the judiciary to sweep aside form when it stands in the way of right. In the place of a recital of cases of the law's delay, we will this month set out a number of current decisions which stand for the new idea of courts and judges. First, there is *Holt v. United States*,¹ decided at the present term of the Supreme Federal Court. The prisoner, who shot a man in the barracks at Fort Worden and was convicted and sentenced to imprisonment for life, appealed to the Supreme Court of the United States on the various technical grounds; which convicted criminals, through their lawyers, are accustomed to urge as a reason which they should go unpunished or that the trial should be gone over again with another chance to escape. These were infelicity in the phraseology of the indictment; the claim that incompetent evidence was admitted before the grand jury; the refusal of the court to exclude from the jury a man who had read the newspapers, who had no opinion other than that derived from the papers, but who believed that he could try the case solely upon the evidence, fairly and impartially; the allowing of the jury to be present during the argument of a legal question before the court; remarks made by the prosecuting attorney in his opening address; permission to the jury to separate during the trial; an opportunity for them to read the daily papers pending the trial; evidence that the prisoner was required, in the

¹ 31 S. C. Rep. 2.

preliminary proceedings, to put on a blouse in order to aid a witness to identify him. But these objections were all overruled by the court as technical objections that did not go to the merits of the case.

To the claim of the prisoner's counsel that the jury should not have been allowed to hear the argument on the admission of an alleged confession which was rejected by the Court, Mr. Justice Holmes said that "if juries are fit to play the part assigned to them by our law, they will be able to do what a judge has to do every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their task." And on the point that as the jury were allowed to separate they *might* have read newspaper comments on the case, Mr. Justice Holmes said: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

The second is *Post v. Brooklyn R. Co.*,² where the Court of Appeals of New York says *per curiam*:

"There are errors in this record, but we find none calling for reversal, when the circumstances under which the erroneous rulings were made and their probable effect on the result are taken into account. Under our system of appeals every error does not require a new trial, for the vast judicial work of the state could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice, it should be disregarded, for undue delay is a denial of justice. We think that the evidence received, subject to objection and exception, could have had no effect on the final result, for it did not change the material aspect of the case or the standing of any witness, or the attitude of either party, in any respect, nor make the theory of either party more probable than it was before."

The third is *Parb v. State*,³ where the Supreme Court of Wisconsin ruled that a conviction of wilfully burning insured property would not be reversed because of the misconduct of certain members of the jury in going to the building where the fire had occurred and making an examination of it. On this point the court said: "It appears that during the trial several of the jurymen went to the building where the fire occurred, which it seems was not destroyed, but only damaged, and made some examination of it. This was misconduct on the part of such jurors.⁴ Such misconduct should not result in reversal of the judgment, however, unless in the opinion of the court it appears that it has affected the substantial rights of the plaintiff in error. After an examination of the entire record we cannot say that it so appears. The trial judge examined into the matter very carefully, and took the testimony of all the jurors, and became convinced that such examination of the building had not in any way affected the verdict or prejudiced the plaintiff in error, and we are unable to say

² 87 N. E. 771.

³ 128 N. W. 65.

⁴ 89 Wis. 39, 61 N. W. 79.

that his conclusion was not correct." But Wisconsin is happy in having a statute (passed in 1909) in these words:

"No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

The fourth is *Press Publishing Co. v. Monteith*,⁵ in the United States Circuit Court of Appeals for the second circuit, where affirming a verdict for damages for libel by a newspaper, Coxe, J., delivering the judgment of the court, says:

"The defendant realizing, apparently, that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal, the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights. Prejudice must be perceived; not presumed or imagined.

"The writer speaking only for himself, is in hearty accord with the modern tendency. The object of all litigation should be to arrive at a just result by the most direct, speedy and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better; but, while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy, and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided, and that even if they had not been made the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides: 'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.' Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice; witnesses die or remove beyond the jurisdiction of the court and the resources of the litigants become exhausted. Believing as we do that the libel here was without justification or excuse, and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

The fifth is *State v. Byrd*,⁶ in Montana. The defendant having been convicted of murder in the second degree, appeals and assigns

⁵ 180 Fed. 356.

⁶ 111 Pac. 407 Mont.

a number of errors as a ground for a new trial. One of them was that a witness being asked whether the prisoner "looked scared" at a certain time, the trial court sustained the objection of the state's attorney to the question. The supreme court rules that the question was competent but inquires was the error prejudicial to defendant's rights, and says: "It ought no longer to be the rule in criminal cases in this state that error being shown, prejudice will be presumed, as was held prior to 1895 when the Codes were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. Section 9415, Rev. Codes, provides: 'After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.' It is for this court to determine whether an error affects the substantial rights of the defendant. If the point can be decided from an inspection of the record, the court may act accordingly; but it is the duty of the defendant who claims prejudice to make the record so show. In this case we have no means of knowing what answer would have been returned by Chamberlain to the question propounded. If he would have answered that he did not notice the defendant's appearance, or that the latter did not appear to be 'scared,' then the ruling of the court carried no prejudice. If, on the other hand, he was prepared to answer that the defendant appeared to fear the deceased, such testimony would have been material to the defendant, and its exclusion would undoubtedly have injured his case. It was within his power to place the trial court and this court in a situation to judge whether or not the answer to the question would benefit him, by offering to prove by the witness that the defendant appeared to be 'scared.' This he did not do."

And the sixth, and the last to be noted this month, is *Siemers v. Insurance Co.*,⁷ where the supreme court of Wisconsin, through Barnes, J., says: "Courts are established for the purpose of getting at the rights of the parties who come before them with controversies, and such rights should not be defeated by technical rules. It is necessary that the trials be carried on in an orderly way. However, where counsel, through some inadvertence, fail to prove some vital fact at the proper time, the client should not be turned out of court because of such failure if he in fact has a meritorious cause of action."

A RAILROAD TICKET AS AN ILLEGAL CONTRACT—IS THE PASSENGER IN PARI DELICTO.—The Supreme Court of South Dakota rules that a ticket issued to a passenger by a railroad in violation of the terms and conditions of orders of the Interstate Commerce

Commission confers no right to passage, and is not required to be accepted by the conductor of a train, and such passenger may be ejected without liability by the carrier to damages. The court places its decision on the elementary and well settled ground that a contract which is illegal confers no right and can be the foundation of no relief to either of the parties to it.⁸

But this is not always true; there are three exceptions at least to this rule and one of them is that the parties shall be *in pari delicto*. And can it be said that a passenger and a railroad are ever on equal terms, in the making of a contract to carry, and if they are not on equal terms they cannot be in equal guilt.⁹

SPORTING CONTESTS AND THE UMPIRE.—In *Smith v. American Automobile Association*,¹⁰ one Charles Glidden had offered a trophy to the winner of an automobile race. The American Automobile Association was made the trustee, the contract was to be carried on under its rules and the award was to be made by it. One Smith was awarded the prize by the judges of the race, but another contestant (Dunham) appealed to the board of appeal, which was constituted under the rules of the association to finally determine the result, which body awarded it to him (Dunham). The plaintiff now attacks in court the validity of this award and claims the trophy. But the supreme court decides against him, saying:

"It is a primary principle of all sporting contests that rules must be made by the bodies conducting them, and that those regularly appointed must decide who wins. The entrants in such competition, as a matter of fairness, agree to abide by the decisions of the umpires, referees or boards having jurisdiction, as the rules may provide. Especially is this true in a contest where the points of eligibility are highly technical, and the association is composed of experts who themselves are well fitted to judge. Before a dissatisfied entrant can ask the courts to interfere and set aside the rulings of a sport governing body there must ordinarily be evidence of fraud, either by a competitor or by the official making the decision. The track judges, umpires, referees, executive committees and governing boards of such associations are supreme within themselves when acting under their recognized authority. If they give the parties concerned a fair opportunity to be heard and there is evidence on which their findings can be based, their decisions, in the absence of fraud, are not subject to judicial review."

THE PRESUMPTION OF KNOWLEDGE OF THE LAW.—In the days in Missouri when there was no standard for admission to the bar and when some of the circuit judges admitted any one who had a few friends to certify that he was of good moral character—the statutory requirement for a saloon license—there was a conviction of murder reversed by the appellate court, because though the

⁸ *Melody v. R. Co.*, 127 N. W. 543.

⁹ *Lawson. Contrs.*, Secs. 56, 331.

¹⁰ 125 N. Y. S. 804.

prisoner had been defended by an individual who had been duly licensed by a circuit judge and who bore the state's certificate that he had been found qualified by one of its judicial officers, the appellate court thought that he had had no "counsel," which the constitution of the state guarantees him.¹¹ Things have changed a good deal in this state since those days, but look a moment on the following two pictures of knowledge of legal ethics in recently decided cases. In South Dakota,¹² proceedings being taken to disbar a state's attorney for bringing actions for his clients against persons whom he was prosecuting for crime growing out of the same transactions which things were specifically forbidden by statute for a state's attorney to do, the attorney pleaded that he was ignorant of the existence of the law.

In New York¹³ an attorney had advised a person to avoid the service of a subpoena issued out of a court of the United States and the latter thereupon evaded the marshal and subsequently fled to Canada and the subpoena was not served. The attorney was subsequently indicted by a Federal Grand Jury under Sec. 5398, 5399 of the U. S. Revised Statutes, and was tried, convicted and fined. The attorney, in a proceeding to disbar him for misconduct set up as a defense that he did not know of the existence of this Federal statute and that an act which directly obstructed the administration of justice could be punished criminally.

Both the Dakota and the New York courts refused to consider such a defence. But think of the appalling ignorance of the principles of right, of fair dealing, of good faith and of the obligations of a lawyer which these cases disclose. The bar was once known as an honorable profession. What can be said of it today in the light of these examples. Individual members there are who have the lofty ideals of yore, the bar associations of the country in different states are trying hard to inculcate in the minds of the young men who are coming into the profession the canons of professional ethics, the law schools by raising their standard and the legislature by making admission a little more difficult are aiding in the work, but a century of free trade in the practice of the law has done its work.

And what a view from another standpoint is given in the opinion in the last case of the commercializing of the profession in the large cities. Remember that this is a judge of the supreme court of New York who is speaking, and who says:

"The respondent in this case was in the employ of clients who were supposed to have great wealth and who were at the head of important corporations. The impression that they are immune from civil or criminal prosecution for their acts seems to have pervaded the community of late years, and with it has grown up a sentiment among many members of the profession that in carrying out their behest a lawyer is performing his duty to the profession, to the public and to the courts. It is the

¹¹ State v. Jones, 12 Mo. App. 93.

¹² Re Schull, 127 N. W. 541.

¹³ Re Robinson, 44 N. Y. L. J. 369.

importance or assumed importance of the client which is sought to justify acts which would be at once condemned in connection with a client who did not have great wealth or great prominence. If the profession is to have the respect of the community, if it is to be trusted by courts and by others who have to do with the administration of justice, its members must realize that a crime is a crime whosoever commits it; and while the highest as well as the lowest criminal is entitled to the protection that the law gives, is entitled to have counsel of his selection and is entitled to all the safeguards that have been devised for his protection, neither his wealth nor prominence will protect a lawyer in going outside of his professional obligations to shield him from the consequences of his acts."

When we come, however, to the question of how will a court decide a certain legal point, is it not a good deal of a guess that the lawyer must make. With our thousands of volumes of reported decisions on both sides of nearly every question presented, what man, learned in the law though he may be, can guarantee that another man or set of men will think as he thinks. Our valuable contemporary, *Law Notes*, cites a case,¹⁴ where it says, twenty-four leading New York city lawyers signed a written opinion that the Supreme Court was authorized to grant a petition for mandamus then pending before the court. "We cannot do so," said Mr. Justice Fuller, speaking for a unanimous court in an opinion of only a dozen lines denying the petition. Again during the preparation of a complaint in an action for partition which involved the title to a very valuable property, "the most eminent counsel then at the New York bar was retained to supervise the proceeding." Attorneys in the case strongly advised that an assignee appointed in bankruptcy proceedings many years before be joined as a defendant. But "the eminent counsel declared that he would retire from the case if any such unnecessary parties were made defendants." The attorneys were overawed, the action went on without the assignee, and as a result the New York Court of Appeals decided that the title to the whole of the property partitioned was defective.¹⁵

And relying upon a written opinion signed by five of the ablest lawyers then at the Connecticut bar—the opinion is set forth in 44 Conn. 395—the directors of a railroad company refused to obey a peremptory mandamus issued by the Superior Court. They were adjudged guilty of contempt and sentenced to imprisonment, and the judgment was affirmed, the court saying: "The reasons assigned in their behalf furnish no excuse for their misconduct, and cannot under the circumstances be received in palliation of their contempt."

FALSE PRETENSES—SWINDLING A SWINDLER.—A curious mixture of crime and sentiment is disclosed in *Foster v. State*,¹⁶ recently before the Supreme Court of Georgia. There lived in

¹⁴ Re Hawkins, 147 U. S. 486, 13 S. C. 512.

¹⁵ See 11 Daly, 373, 464.
¹⁶ 68 S. E. 793.

Gainesville, in that state, a grass widow named Mrs. Robertson, who had as an intimate acquaintance the defendant, Foster, a young married man, connected with some kind of a show. Foster told her that he represented a Cincinnati company which organized lodges and furnished counterfeit money to its members; that he could cause her to be initiated by her paying the sum of \$100, and that she would receive \$500 in counterfeit money; but that she would have to go to Jacksonville, Fla. (where the company's agent would be on January 12), to be initiated and get the money. As they were to leave Gainesville secretly, on the night of January 12th, she privately met him at the station, where she gave him \$10 to purchase her ticket to Atlanta. He purchased it for \$3.15 and offered her back the change, but she told him to keep it for her. In Atlanta she gave him \$20 with which to buy her a mileage book, and he bought that for her, putting the book in his pocket after securing her transportation to Jacksonville from it. Arriving in Jacksonville next day, she gave him the \$100 with which he was to get her the \$500 in spurious currency. But Foster did not come back. The widow was left penniless, but borrowed enough money from a policeman to get back home, and returned from Jacksonville on the same day she arrived there. The Supreme Court was obliged to reverse a conviction for swindling by Foster, as there was nothing of value to the subject of the false representation. He is not guilty of the statutory offense of cheating and swindling because he falsely represented that the existing conditions were such that, if she would go to certain expense, she could buy a certain amount of counterfeit money, and she, believing him, incurred that expense and did not get the counterfeit money. If the representation had proved true, she would have been in a worse fix than she was when they proved untrue. The very possession of the counterfeit money would have made her a felon. As it was, when she did not get it, she was simply left as a foolish woman with less money and more experience; and, in legal contemplation at least, even this is better than being a felon. Counterfeit money is not a thing of value. The very possession of it is criminal. It is a violation of law to make it, to own it, or use it. It is utterly without value. Suppose that the defendant had said to the prosecutrix: "Your sworn enemy is in Jacksonville, if you will go there with me and pay me \$100, I will show that enemy to you that you may poison him." Suppose the defendant's statement were a lie, could the transaction be treated as cheating and swindling? The privilege of poisoning one's enemy is not a thing of value. And as to the other things that occurred, the court says:

"Plainly, the conviction cannot rest on the failure of the defendant to return the change out of the \$10 bill which he received from the prosecutrix at Gainesville to buy her railroad ticket at Atlanta. She asked him to keep that for her. If he failed to return it on demand, the criminality of the transaction might be investigated under an indictment for larceny

after trust, but not under this accusation for cheating and swindling. However consummate the defendant's knavery may appear, however pitiable is the plight of the prosecutrix, we are constrained to hold that the defendant's conviction must be set aside. And after all—

“When lovely woman stoops to folly,
And finds too late that men betray,
What charm can soothe her melancholy?
What art can wash her guilt away?”¹⁷

WHERE THE LEGISLATURE IS FREE AND THE JUDICIARY BOUND.—The difference between the power of the judiciary under the English Constitution with a legislative body uncurbed by a written constitution, and the same power in our national and state governments is well brought out in the course of an address on “Legislature and Judiciary,” by Lord Shaw, a member of the Judicial Committee of the Privy Council, which is the highest court of appeal in the English Empire. He says:

“In a wide and general sense the British Legislature is free. In a similar sense the judiciary is bound. The power which formulated and enacted laws could choose its own road; the power which interpreted and applied them must choose the path prescribed. Were this wide and general truth the whole truth, the relation between Legislature and judiciary might be summed up as those of domination on the one side and subservient obedience on the other; and there would be nothing more, or at least little more, to be said. It, of course, must stand admitted that under the British Constitution it was never open to challenge the validity of legislation as an excess of power; and so also was it incompetent to challenge its validity by urging that its action betrayed injustice, caprice, or unreason. The judiciary was in most cases willing to act, but in all cases it did act and must act on the familiar truism that ‘the legislature, being in truth the sovereign power, is always of equal, always of absolute authority,’ and that the corrective lay solely and ultimately with the body of the public. The outstanding restraint of legislative power, limitless as regarded its past, was that Parliament could not bind its future, and that no form of language would avail in any attempt to do so. The corrective of the action of Parliament as a human and fallible institution was not a legal corrective, lay not with the judiciary, but was alone a constitutional corrective, and lay alone with Parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience, or a broader perspective in the regions of applied justice.”

BEATING A MOTHER AND MORAL TURPITUDE.—In his eagerness to win his client's case, the lawyer will advance arguments so utterly devoid of reason and common sense that the laymen must often wonder why it is that one who is presumed to be learned in the law should be so ignorant of common usage and public opinion. He does not, however, sufficiently appreciate that disputes in our courts are not always decided upon reason and right, but upon formal and often unjust and illogical rules. This is why we find such a defense set up to an action for slander (the

¹⁷ Foster v. State, 68 S. E. 739 Ga.

charge being that the plaintiff had been convicted of beating his mother) that the beating of one's mother is not regarded in this country as an offense involving any moral turpitude and therefore the charge was not actionable *per se*.¹⁸ After the lecture which the court administered to the defendant and his defender, both of them are probably convinced that their opinion is not very extensively shared by the people of the United States in the twentieth century. "The charge," said the judge, "imparts not mere exercise of force unlawfully, but a wanton disregard or repudiation of filial honor and duty that a son owes to the one who bore and nurtured him. The obligations of the Fifth Commandment are recognized by the secular as well as the ecclesiastical law. The family relation is the basis upon which our entire social superstructure is erected. The dishonoring of the parent by the child injuriously affects the whole social fabric. Very low, indeed, in the scale of civilization, would a community be that recognized no distinction in morals between an assault and battery by one stranger upon another and one by a son upon his mother. The numerous provocations which cause many fair-minded and good-hearted men to lose their self-control and commit assault and battery upon their fellows would not disturb their equanimity in their dealings with their parents. Respect and love for parents is written into the very law of a normal man's being, and this would prevent him from assaulting them, whatever the provocation. The beating of a mother by her son is therefore abnormal, and so contrary to the accepted and customary rules of civilized society that baseness and depravity of heart in the perpetrator is at once suggested to the mind on hearing that such an offence has been committed. To hold in this state and generation that the beating of one's mother does not involve moral turpitude would itself be a slander of a commonwealth conspicuous for its high regard for and enforcement of filial obligations."

Even the comic opera of Gilbert and Sullivan, which makes all manner of fun of the mother-in-law, classes the "Coster Jumping on his Mother" with the "Cut-throat" and the "Gentlemanly Burglar."

"When the gentlemanly burglar isn't burgling
When the costers finished jumping on his mother,
When the cut-throat isn't occupied with crime,
He loves to hear the gentle brook a-gurgling
And listen to the merry village chime."

HOW NOT TO ASK FOR A CHRISTMAS GIFT.—In an Alabama case it appears that last Christmas morning a negro man approached a white woman and after being informed that her husband was not at home, said: "Christmas gift; give me some fresh meat for a

¹⁸ *Sipp v. Coleman*, 179 Fed. 997.

Christmas gift." The woman replied: "I have no fresh meat." The accused said: "Give me some backbone." The woman: "I have no backbone." The accused: "Give me some spareribs." The woman: "I have none for you." The accused: "Give me some fresh meat for a Christmas gift, and I will give you something." A conviction of the negro for using insulting and obscene language was affirmed.¹⁹

CITY ORDINANCES REGULATING EMISSION OF SMOKE.—Considering that St. Louis, the home of the REVIEW, has recently passed Pittsburg in its bad reputation as a smoky town, the efforts of other cities to curb this nuisance and menace to health and happiness and good order are of interest. In *City of Rochester v Macaulay Milling Co.*,²⁰ the City of Rochester had enacted the following ordinance:

For the purpose of regulating the emission of smoke from chimneys, stacks, flues or open spaces within the City of Rochester, and to determine by comparison the degree of darkness of smoke so emitted, a color scale shall be and the same is hereby adopted as follows:

"A dead white surface of cardboard or other material, not less than sixteen inches in length and in width, shall be divided into squares by straight dead black lines drawn at right angles to one another across said surface. Each of said lines shall be of a uniform width of one-twenty-fourth of an inch and shall be spaced one-quarter of an inch from centers. The color of the above scale when viewed from a distance of not less than one hundred feet in the open air shall be used as a basis of comparison of the color of smoke in the City of Rochester.

"It is forbidden and hereby declared to be unlawful to suffer or permit the escape of smoke from any fire not in motion or fire banked or in a state of rest, or from any burning or active fire through a stationary stack, flue or chimney, of a color darker than said scale, provided, however, that the provisions of this ordinance shall not apply to the escape of smoke from any stationary stack, flue or chimney for a period of not to exceed five minutes whenever the successful operation and management of any fire necessarily requires such escape of smoke, but such escape of smoke shall not be permitted or allowed for such period of time more often than once in four consecutive hours."

And penalties were provided for the violation of these provisions. Now there are people in Rochester, as well as elsewhere, who like smoke. Perhaps they agree with Mark Twain. "I like smoke," said the genial author, "I smoke a dozen cigars a day." But the defendants in the case above objected to the law because it interfered with the profits of their mill, and challenged the right of the city to prevent the nuisance. But the Court of Appeals of New York decides against them, saying that the power of a city makes legal restrictions and prohibitions which are necessary to guard public health, morals and safety, and to conserve public peace, order and the general welfare. The city may make and enforce such regulations and ordinances, although they interfere

¹⁹ Tumey v. State, 52 S. E. 910.

²⁰ 92 N. E. 640.

ployee was more than a debt of honor, the bargains he would make would be less favorable than the ones he makes now, in every state, with the employees' civil liability to respond in damages for a breach. Liability to an action for damages tends to make a man keep his contract, as well as a fine or a liability to imprisonment.

"If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor; and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right; it does not make the laborer a slave. But if a fine may be imposed, imprisonment may be imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the 13th Amendment in so many words. Also the power of the states to make breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime. There is produced a sort of illusion if a contract to labor ends in compulsory labor in a prison. But compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the state has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the state should not throw its weight on the side of performance. There is no relation between its doing so in the manner supposed, and allowing a private master to use private force upon a laborer who wishes to leave. . . . To sum up, I think that obtaining money by fraud may be made a crime as well as murder or theft; that a false representation, expressed or implied, at the time of making a contract of labor, that one intends to perform it, and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other; that if made a crime it may be punished like any other crime; and that an unjustified departure from the promised service without repayment may be declared a sufficient case to go to the jury for their judgment; all without in any way infringing the 13th Amendment or the statutes of the United States."

LIBEL ON THE KING OF ENGLAND.—On the 1st of February there took place in London, before Chief Justice Alverstone and a special jury, a trial of a kind so rare as to be historic. On a criminal information laid by the attorney general, one E. F. Mylius was charged with publishing a defamatory libel concerning his Majesty in a leaflet entitled "Liberator," a revolutionary organ printed in Paris. The article complained of was headed "Sanctified Bigamy," and it repeated in a grossly offensive man-

The Chief Justice: As you are perfectly well aware, the King cannot be summoned.

On the Master proceeding to call over the names of the jury, the defendant interposed: I wish to ask each juror whether he is able to return a fair and impartial verdict upon the evidence.

The Chief Justice: That is not a ground of objection. The names need not be called over.

The jury were then sworn in the usual way, without the defendant taking further objection.

After the defendant had been sentenced and had been removed from the court room, the attorney general rose and said: "There is a matter which I would like to mention now, and which it would not have been right that I should have mentioned until the verdict and sentence had been passed in this case. I hold in my hand at this moment a document under the hand of his Majesty the King, and with your lordship's permission I will read it in court."

The attorney general then read the following letter:

I am authorized by his Majesty to state publicly that he was never married except to the Queen, and that he never went through any ceremony of marriage except with the Queen; and, further, that he would have attended to give evidence to this effect had he not received advice from the Law Officers of the Crown that it would be unconstitutional for him to do so.

The trial lasted about three and a half hours.

THE TESTAMENTARY WISHES OF A FELON—CRIPPEN'S WILL.—The last chapter in the Crippen case will probably be found in the ruling the other day of the Probate Division of the English High Court on the application of Miss LeNeve to administer on the estate of the victim of the tragedy, the murderer's wife. The latter died intestate and under the law her property would have been disposable by her husband, but he, while under sentence of death, appointed his paramour, Miss LeNeve, his executrix and sole legatee. Mrs. Crippen's sister applied for letters of administration on her estate on the ground that a felon might not profit by his felonious act. This view was upheld by the judge, who gave judgment in favor of the application. He said that under the statute the Court had in special circumstances discretion to appoint such person as the Court thought fit to be administrator of the personal estate of a dead intestate, in lieu of the person who would otherwise be entitled. In this case, a man who had been convicted of the wilful murder of his wife had appointed a person his executrix and universal legatee, who claimed as executrix to administer the murdered wife's estate, and to be entitled to the latter's property. Her only claim was one resulting from the felonious act, and it was equivalent to a claim made by the felon himself. These were clearly "special circumstances," and he should therefore pass over the executrix of Crippen (Miss LeNeve), and

grant letters of administration to the solicitor representing the sister of Mrs. Crippen. The judge added that it would be revolting to the human mind that any other doctrine than the one on which he now acted should be possible in the English system of jurisprudence.

INNKEEPER—NO DUTY TO RECEIVE A PRIZE FIGHTER.—A prize fighter named Battling Nelson having secured a room, through his agent, at the Bellevue-Stratford Hotel in the city of Philadelphia, was able to occupy it but one night, as the next morning his belongings were removed from the room and in the evening when he applied for another room he was refused accommodations point blank. For this indignity he sued the hotel proprietor in the Federal Court. On the trial the jury were instructed by the judge as follows:

"When a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded. The innkeeper, however, can refuse to admit any one, if he pleases, rendering himself liable in an action for any injury the stranger may sustain. If he refuses to entertain a stranger or a traveler for a good reason, he is not liable for damages, as the law only requires him to entertain fit persons. It is also the duty of an innkeeper to protect his guests against the intrusion of boisterous, objectionable characters and persons intoxicated, and such persons may be rejected. Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury; that if the jury believed that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the State of Pennsylvania, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him. The evidence reviewed by the court to the jury indicated that plaintiff, while claiming to be engaged in athletics and looking after real estate, had in fact represented himself in his own biography as the champion lightweight prize fighter of the world up to February 22, 1910. It also appeared that he had engaged in nearly a hundred hotly-contested battles which were such as to be prohibited by the laws of the State of Pennsylvania and of other states, by which such contests are made a criminal offense. The court thereupon charged that it was for the jury to say whether a violator of the criminal laws of the various states, such as the evidence showed plaintiff was, would be a reputable person to be admitted to a hotel in Pennsylvania under the law as previously stated, and that, if the jury conclude that he was not, he could not recover."

The jury found a verdict in favor of the landlord.²²

²² Nelson v. Boldt, 180 Fed. 779.

WHO ARE DEPENDENT FEMALES.—The constitution of Georgia provides that there shall be exempt from levy and sale of the property of every head of a family or person having the care and support of dependent females of any age, who is not the head of a family, certain realty or personalty. The Federal Court holds that where a bankrupt son lived alone with his mother and provided for her protection, though she was not dependent on him for financial support, he nevertheless cared for a dependent female, and was entitled to the exemption, the judge saying:

"It appears to me that the framers of the constitution attempted to reward, not only the man who is supporting a dependent person, but a man who is caring for dependent females of any age. Now, can it be denied that in our southern country a woman of any age who lives in the country needs the constant care of a man? Those who disregard that necessity realize very little of the dangerous condition of society here. It is not always financial dependence that gives a homestead. There is the trustee of a family of minor children. He is entitled to a homestead, whether they are dependent upon him or not. If he is the trustee, he stands in a fiduciary relation toward the minor children. Here in this case the son stands in the same relation to his mother. They live in the same home. There are no other people there. The daughters have married and gone away to their husbands and children. When the shades of evening begin to fall, and the solitude of night environs her lonely home, her condition would be pitiable indeed if it were not for the care of the manly son. I think it is in contemplation of law that he is entitled to his homestead. It may be said that she is not dependent upon him in a financial sense. He may be the recipient of her bounty. How gladly she gives it to him! And how wretched she would be if protection was forced to be elsewhere! The court thinks that is a benefit which the law gives her, and so far as the action of this court is concerned he is, because of his relations to his mother, held entitled to his homestead. I do not think the referee took the broad, philosophical view of this great social question which he ought to have done. This court will always be careful to provide if possible for those men who, while not strictly heads of families, yet have the natural and righteous care of dependent females."²³

CRIME COMMITTED BY WIFE IN HUSBAND'S PRESENCE.—The decision of the Supreme Court of New Jersey in *State v. Martin*,²⁴ is eighteenth century law applied to different times and conditions. A married woman had been convicted of selling obscene postal cards in her husband's store at Atlantic City, but the Appellate Court held that a verdict of acquittal of the wife should have been directed, it appearing that the husband was actually in the shop at the time of the sale and directed her to wait upon the particular purchaser who furnished evidence for the prosecution. It is true that this ruling is abundantly supported by authority, but as well said by a contemporary, in view of the systematic, organized effort to obtain political rights for women, the partial results that have been achieved in that direction and the full prop-

²³ *Re Glisson*, 182 Fed. 287.

²⁴ 78 A. 12.

erty rights of married women, this presumption of marital coercion as to crimes is an anachronism and should be abrogated.

INJUNCTION AGAINST PUBLICATION OF BIOGRAPHY.—In a recent case in the Federal Court at New York the plaintiff asked an injunction to prevent the defendant from publishing in the National Cyclopaedia of American Biography facts of complainant's life obtained from him, and to deliver up and cancel a certain written instrument of subscription to the said cyclopedia obtained from him by fraudulent misrepresentations.

It was shown that the complainant gave a statement of facts concerning his life on an understanding that they would be used in a set of books officially recognized in some way by the Federal Government. It was held that there was an implied promise that the facts would not be used otherwise than as understood by complainant, and that an injunction would lie to prevent publication of his biography in a set of books other than a set issued in some form under the auspices of the Federal Government.²⁵

INSURANCE OF INTOXICATING LIQUORS IN PROHIBITION STATE.—The Federal Court of Appeals rules that a contract of insurance of whisky stored in Iowa is not void because it tends to assist the insured to violate the public policy and laws of Iowa against the possession and sale of intoxicating liquors therein.²⁶

This case falls under the well settled American rule as to illegal contracts, that it is no defense to a recovery for articles purchased for an illegal purpose that the seller knew that the sale would aid the buyer to violate the law or to defy the public policy of the state when the seller neither combined nor conspired with the buyer to accomplish that result, nor shared in the benefits of such a violation.²⁷

INFECTION OF BUILDING AS WASTE.—In a Massachusetts case,²⁸ an action in the nature of waste was brought by the mortgagee of certain premises against the members of a municipal board of health, who had leased the premises of the mortgagor "to be used as a contagious hospital." The Supreme Federal Court holds that while mere injury to the reputation of real estate or the supposed diminution of its value, resting on whimsical or sentimental grounds or arising from dictates of custom or taste, do not constitute waste, yet a jury may properly find that the possibility of germination of the smallpox germs, which, it may be found, have been deposited within a house used as a smallpox hospital, constitutes waste, unless it has been shown that the germs can be

²⁵ *Colgate v. White Co.*, 180 Fed. 885.

²⁶ *Mechanics Ins. Co. v. Hoover Distilling Co.*, 182 Fed., 590.

²⁷ *Lawson, Contr.*, Sec. 339.

²⁸ *Delano v. Smith*, 92 N. E. 500.

removed by disinfection or otherwise without material physical change in the house, so as to make it as safe for residence as before its use for hospital purposes, saying: "Impregnation of a building with the indiscernible but vital germs of a dangerous malady is closely analogous to the sowing of seeds of deleterious plants, and may be in its effect far more injurious. It may be in fact even more harmful than to tear down or remove a part of the building. It is in principle the same general kind of injury as the more familiar instances of waste."

DIVORCE IN CANADA AND THE UNITED STATES—A CONTRAST.—At the London conference last August of the International Law Association a paper on the above subject was read by Professor F. P. Walton, the Dean of the law faculty of McGill University of Montreal. He showed that divorce courts existed only in the Dominion in the maritime provinces of Nova Scotia, New Brunswick and Prince Edward Island, and the Pacific province of British Columbia, but not in the others, but that in the other five provinces—which held eighty per cent of the whole population of the country—there were no divorce courts. In these provinces divorce is only obtained through a statute passed by the Dominion Parliament and since the Dominion was created, 41 years, only 140 divorces have been granted, a little over three a year. And in that period in the provinces having divorce courts only 303 divorces have been granted. The professor concludes with this comparison: "During these forty years in which Canada has slowly been compiling this beggarly total of 443 divorces, the States of the neighboring Republic have dissolved 1,274,341 marriages. The population of Canada in 1867 stood to that of the United States about as 1 to 12, and that ratio has not greatly varied up to the present time, when Canada has seven and a half millions as against the ninety millions of the United States. Taking this proportion as roughly accurate for the years between 1867 and 1906, if divorces had been granted in the United States on the same scale as in Canada, they would have amounted to twelve times 431, that is to 5,172, instead of 1,274,341. In other words, divorce is in the United States more than three hundred and twenty times as common as in Canada. Startling as is this contrast now, it is likely that it will become even more startling in the future. For the popularity of divorce in the United States is increasing at a very rapid rate, about three times as fast as the increase in the population. In 1867, divorces were about 27 per one hundred thousand, whereas in 1906 there were eighty-six divorces per one hundred thousand of the population. It is estimated that at present of the marriages celebrated in the United States about one in twelve is terminated by divorce, and the advantages of this great institution are only beginning to be appreciated.

The figures show that in two-thirds of all the divorces in the United States it is the wife who is the petitioner. It is significant to notice that in Canada more than a half of the divorces are at the instance of the husband. I have not the least doubt that there are very many cases where the American courts perform a useful service in liberating a wife from a vicious or drunken husband who, perhaps, does not even support her. There is probably no other country where an active and intelligent woman can so easily support herself. To a considerable extent this may account for the readiness of American women to seek for divorce. But many other causes are at work. Probably the greatest of all is the impatience of all restraint which is characteristic of the present generation. The conviction that we ought to have anything we want seems to be becoming the main article in the working creed of a large part of the population. A young woman brought up to think that nothing ought to stand in the way of the gratification of her caprices is pretty sure to find it irksome to have to consult the wishes and convenience of a husband. *Hoc volo, sic jubeo, sit pro ratione voluntas* is not a good motto for married life. Now-a-days, two young people enter upon a marriage with the knowledge that if they change their minds there will be no insuperable difficulty in being off with the old love, and, perhaps, on with the new. Under the old regime which we still follow in Canada married people have to bear and forbear, if not out of affection, at least out of prudence. The indulgence of self-will and bad temper is restrained by the consciousness that the common life must be made tolerable. Many of the marriages which turn out the happiest in the long run have not been without times of storm and stress. If there had been an easy way of dissolving the union it might very well have been taken. Whether the free marriages of the new order will be happier remains to be seen. It may be all in the way of progress that one marriage out of twelve should end in divorce. But I feel no regret that Canada is not in the van of this onward march. It may be as well to allow this great experiment to be tried first in another country."

VALUE OF LIFE OF VICTIM IN HOMICIDE TRIAL.—In a recent California case,²⁹ the charge being the murder of a Chinese woman, a witness on the trial was asked what value was placed on the life of a female in China, the object apparently being to show that in the Chinese mind a Chinese woman amounted to very little, and that the taking of the life of such a woman was not in the prisoner's estimation a very serious matter. The question was held properly excluded on appeal. This evidence, the court said, could not assist in the determination of the question of the intent, deliberation, and premeditation essential to constitute murder in

²⁹ People v. Luls, 110 Pac. 580.

the first degree; and that assuming that a defendant in a murder case is entitled to introduce evidence not material or admissible on the question of his guilt or the degree of his offense, solely for the purpose of assisting the jury in the exercise of its discretion to substitute life imprisonment for the death penalty, the proposed evidence was not competent for that purpose. "Whatever evidence may be so introduced, certainly evidence of the opinion of the murderer as to the value or importance of the life of the party murdered by him can play no legitimate part in his favor."

THE JUDGE UNDER THE COMMON LAW JURY TRIAL SYSTEM.—It is a remarkable fact that one of the very essential features of the old common law system of jury trials has been allowed to become obsolete or has either been frittered away or prohibited by both statutory and constitutional enactments—it is an element of the common law trial which tends to more accurate results and a more speedy trial, both of which are of crying need in our administration of the law. The law's delay, the great length to which trials have extended themselves, the placing in the foreground the opposing attorneys, in actions both criminal and civil, and the tendency to leave the course of the trial rather in their hands than in the hands of the presiding justice has distinctly marked for criticism our system of jury trials and rendered abortive, if not obsolete, some of the essential features of the good old English common law system. There is no doubt that criminal procedure in this country has assumed the spectacle of a farce compared with its administration in England. President Taft has made it the subject of comment in a message to Congress and has elsewhere dwelt on our inefficient system of jury trials.

The one feature of our system of procedure that makes largely for this condition of affairs is the lack of supervision and control exercised by the judges during the course of the trial. One finds in England that trials are consummated in half the time through the great authority exercised by the English judge and the control he has of the proceedings. Where the "course of the common law" is the law of the land this is the *very essence* of a common law trial. It is high time that the judges reclaim this authority, which has been checked and eliminated by custom, practice and statutory enactments. The judge should be permitted to have the full sway, and exercise the same, that the common law trial afforded him.

An attempted restriction upon his authority is often made, in this country, by statute. The judge is not permitted, by statute, to charge the jury with regard to matters of fact or to express his opinion on matters of fact in the charge to the jury or to comment on the weight of the evidence. These matters are of the *very essence* of a common law trial and the *sine qua non* to a full control and an accurate framing of the issues to a jury by the

judge. Such legislative enactments are absolutely unconstitutional when once one admits that the course of the trial is according to the common law. It is not difficult to demonstrate this. It is simply asserting that where the common law method of trial is the law of the land, as it is in the territories under the Federal Government, and many of the States, any attempt to restrict the judge in the full control of the proceedings is trespassing on one of the very essential elements of a common law trial. Let me quote from Lord Hale, in his History of the Common Law, Chap. 12, touching trial by jury, he says: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them, and also in matters of fact to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen." This language has been heretofore approved and these very words quoted by the highest judicial tribunal of our land. This right of the judge to comment upon the testimony, to assist the jury in arriving at a just conclusion and to call their attention to parts of it which he thinks important and even express his opinion upon the facts, provided only he submits those questions for their determination, has time and again been adjudicated by the Supreme Court of the United States.³⁰ Is there any doubt that a judge can give great "light and assistance" in so doing; is there any doubt that criminal trials will become far more accurate and attain the ends and aims sought in a speedier manner if this essential is retained? Nor is this merely matter of procedure that can be waived or restricted by statute. In an opinion by the Supreme Court of the United States, the Court speaking through Mr. Justice Swayne, says (where error was alleged because of the comment by the judge upon the evidence to a jury): "The personal conduct and administration of the judge in the discharge of his separate function is, in our judgment, neither practice, pleading nor a form nor mode of proceeding, etc." Again, what more apposite language than this, by the same tribunal: "There is none more important duty resting upon those who preside at jury trials." So also the Court has said: "The judge is not a mere moderator of a town meeting, submitting questions to a jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility."

What then is this important and essential function of the judge? It is purely a *judicial function*, a very part and parcel of

³⁰ *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545; *U. S. & Phlla. & Reading R. Co.*, 123 U. S. 113.

the common law jury trial, and just as much so as the twelve men that go to make up the panel at common law. If it is a judicial function, what right has the legislature to restrict or in any manner tamper with it? It is elementary that the legislative body cannot encroach upon the prerogatives of the judiciary, and yet this seems to have been entirely overlooked by both judges and legislative bodies, particularly in the states and territories having the common law system of trials. On the national side it is to be noted that Congress has never undertaken to restrict this right in the Federal Courts; that body has evidently borne in mind this essential judicial function of the judge in a common law trial and has realized that any attempt to restrict the same would be unconstitutional. Certain it is that the Federal Courts have full sweep in that direction and the accuracy of their criminal trials is far superior on that account to those of the states and territories. In most jurisdictions the courts have lost entirely, and only from want of use and because of supposedly valid statutes, their efficacy in promoting accurate, efficient and speedy trials. There is need, at this time, that the great and effective control of the presiding judge be again restored and that this feature of the common law trial become again a part and parcel of our jury trial system with all its vigor and force, to the end that, like the English courts of common law, we may see speedy justice and accurate results. The "lame and halting gait of American justice," as one writer has put it, can be in a great measure curbed and restricted by this simple recall of power by the judges themselves.³¹

DISBARMENT OF ATTORNEYS—PROMOTERS OF SHAM CORPORATIONS—COLLECTING AGENCIES.—The Federal Court in Georgia rules that it is misconduct affording ground for disbarment by a Federal Court for attorneys to organize in another state a sham corporation, having neither capital nor business other than as a medium for bringing suits in the Federal Courts which could not be brought there by the real parties in interest, and to use such corporation after its illegal character has been adjudged by the Federal Courts in bringing suits in a State Court.³²

The corporation in question had been adjudged to be a sham one by the Supreme Court of the United States.³³

In another case before the Supreme Court of New York,³⁴ an attorney at law had executed a power of attorney to sign his name to any and all letters of collection and other business of a corporation. Now the statute of that state requires an attorney to take the constitutional oath of office, subjects him to a penalty for

³¹ Julius Staab, Albuquerque, New Mexico.

³² 211 U. S. 603.

³³ Gelders v. Haygood, 182 Fed. 109.

³⁴ Re Rothschild, 125 N. Y. Supp. 629.

permitting a person not a general law partner, or a clerk in his office, to sue out a mandate, or prosecute or defend an action in his name, makes it a misdemeanor for a person not admitted to practice as an attorney, and for an attorney to permit any person not his general law partner, or a clerk in his office, to sue out process, or to prosecute or defend any action in his name, except as authorized by the section.

The court held that under these circumstances the act of the attorney was such professional misconduct as should require his disbarment, but as the offense had been brought to the attention of the court for the first time, the attorney was merely suspended from practice for one year, but the court stated that, after the foregoing expression of its views, it would regard, in the future, such an offense as one requiring disbarment.

ADVERTISING IN SUNDAY NEWSPAPERS.—The Supreme Court of Wisconsin holds that under the Sunday law of that state prohibiting labor, business, or working, except only works of necessity and charity, from being carried on on Sunday, a newspaper cannot recover for services performed on Sunday in publishing advertisements.³⁵

The Court says that the question is not free from difficulty. It is a matter of common knowledge that Sunday newspapers are published throughout the country, and that they contain in their columns much valuable advertising matter, and it seems like a harsh rule to hold that such publications made on Sunday cannot be recovered for, although perhaps much of the work in preparing the matter for publication is done on secular days. But the case presented does not deal with a situation of agreement made on a secular day for work to be done generally, nor a case of agreement made on Sunday for work afterwards done on a secular day and supported by a subsequent promise, but the newspaper placed itself squarely upon the right to recover for what the services performed on Sunday were reasonably worth. The conclusion of the Court is that the plaintiff cannot recover for the Sunday items. If the rule of the statute be wrong, it is for the legislature, not the courts, to afford relief.

ORDINANCE PROHIBITING STREET CRIERS.—The constitutionality of an ordinance of the City of Chicago prohibiting peddlers in the streets from crying their wares was assailed in *Goodrich v. Busse*,³⁶ on the ground that it was depriving a person of his property without due process of law. But the Supreme Court said that the plaintiff was not deprived of his right to engage in peddling fruits and vegetables in the streets and alleys of the city.

³⁵ *Sentinel Co. v. Melselrach Co.*,
128 N. W. 861.

³⁶ 93 N. E. 292.

While it may be conceded that he has the right to sell fruits and vegetables upon the public streets and alleys of the city, clearly he has no vested property right resting in him to make a noise upon the streets of the city by advertising his fruits and vegetables by public outcry in such places, any more than he would have the right to advertise such articles by any other means upon the streets and alleys of the city, the result of which would be to disturb the peace and quiet of the neighborhood in which he pursues his calling. Advertising articles usually handled by peddlers upon the streets and alleys of the city by public outcry, especially if 6,000 persons were engaged at one time in so advertising the articles which they were offering for sale, would soon, if not immediately, become, if not controlled, a public nuisance, and one which would urgently demand abatement. The court referred to a Louisiana case upholding a similar ordinance in the city of New Orleans.²⁷

The plaintiff also objected to the ordinance because it, he said, discriminated against him in that it, by its terms, permitted a person whose business was confined to amusement grounds, parks, halls, and other places duly licensed by the city, to advertise his wares by public outcry, while the plaintiff was prohibited from so advertising his fruits and vegetables upon the public streets and alleys of the city. But the court thought the contention without force for the reason that he was not prohibited from selling or advertising for sale his fruits and vegetables in the places excepted from the operation of the ordinance by public outcry, if he desired to frequent those places for the purpose of making sales. It was clear that the conditions which surround amusement grounds, parks, halls, and other places duly licensed by the city so far differ from the conditions which are found in and upon public streets and alleys of the city of Chicago that such differences would furnish a reasonable basis upon which to rest a distinction. Persons frequent the places excepted for reasons wholly different from those which influence the citizen when he builds his house or place of business upon the public streets or uses the public alleys of the city. At the one place the visiting public anticipates and expects there will be noise and confusion, while upon the streets and alleys of the city, outside of the noise and confusion incident to travel, it may well be expected order and quiet will be maintained. Especially is this true in a great city like Chicago, where a large per cent of its working people perform services at night and sleep during the day, and who, during their hours of rest in the daytime, should be protected by the city from being disturbed by the shrill outcries of fruit and vegetable peddlers as they pursue their calling throughout the city.

²⁷ *New Orleans v. Fargot*, 116 La. Ann. 370, 40 South. 735.

NOTES OF RECENT DECISIONS.

BAILMENTS—DUTIES OF BAILEE—INSURANCE.—One engaging in the business of milling rice, who, during the several years a person took his rice to the mill to be milled, charged two cents per sack for insurance, and who rendered an account in which two cents was charged as paid for insurance, and who obtained a settlement of the accounts on that basis, was under the duty to insure the rice to its full value, and where he did not do so, and a loss occurred, he was liable for the resulting damages, although he procured insurance to the amount which the two cents would purchase.¹

BANKRUPTCY—DISCHARGE IN SECOND PROCEEDING OF DEBTS PROVABLE IN FIRST.—Where a bankrupt, in his first proceeding in bankruptcy, fails to obtain a discharge because his petition therefor is dismissed for want of prosecution, he is not entitled to a discharge in a second bankruptcy proceeding from debts provable, and in fact proved, in the first.²

CARRIERS OF GOODS—INTERSTATE COMMERCE ACT—LIABILITY OF INITIAL CARRIER.—A railroad company engaged in interstate commerce, which receives goods to be transported from a point in this state to a point in another state, is liable by force of Section 20 of the Interstate Commerce Act for a loss of the property caused by it or any connecting carrier, although the receiving company failed to issue a receipt or bill of lading therefor.³

CARRIERS OF PASSENGERS—INJURIES AT STATION—DEFECTS.—Where plaintiff went to the station of defendant to meet his son, and while in conversation on the outside of the platform he leaned or brushed against what appeared to be a heavy railing, but which in fact was so rotten that it gave away and caused him to fall and sustain injuries, the defective condition of the railing having existed for a long time, and defendant being aware of it, defendant was liable, for such a railing is not entirely to mark the boundaries of the station, but to make a place for persons to stand in fair weather.⁴

CONFLICT OF LAWS—HUSBAND AND WIFE—PROMISSORY NOTE.—A note signed by a husband was made payable to the order of his wife, who indorsed it for the husband's accommodation, and he delivered the note to his creditors in New York City. The note was dated and made payable in New Jersey. *Held*, that in the absence of any evidence showing that the husband was empowered by the wife, expressly or impliedly, to pass away the note elsewhere than in New Jersey, it would be presumed to be a New Jersey contract.⁵

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—IMPOSING SPECIAL BURDEN ON RAILROAD.—The expense of constructing a bridge over a highway, made necessary by the action of the municipality in opening such highway through the company's embankment, may be cast upon the company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.⁶

¹ *Broussard v. South Texas Co.*, 131 S. W. 412 Tex.

² *Pellett v. Cosel*, 179 Fed. 488.

³ *International Watch Co. v. R. Co.*, 78 A. 49 N. J.

⁴ *Winscott v. R. Co.*, 131 S. W. 2 Mo.

⁵ *Basilea v. Spagnuolo*, 77 A. 531 N. J.

⁶ *Conn. &c. R. Co. v. Connersville*, 31 S. C. 93 U. S.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ASSESSMENT TAX.—1. The judicial enforcement of a railroad franchise tax does not deny the railroad due process of law, because the court treated the entry of the assessment in the form provided for the purpose upon the jacket or envelope enclosing the report of the railroad as a sufficient record of the assessment. Nor does the entry of an assessment of a railroad franchise tax under the name of the road which formerly owned the franchise. 2. The enforcement of a franchise tax by a judgment *in personam* against a railroad which, while not the owner of the franchise, is operating the road under an arrangement with the purchaser at a judicial sale, and is in possession and full control of the railroad property and its earnings, does not deny due process of law.¹

CONSTITUTIONAL LAW—FEDERAL EMPLOYERS' LIABILITY ACT.—The Federal Act of 1908 has not perpetuated the infirmities which rendered the Act of 1906 unconstitutional. Under the present statute a railroad company engaged in interstate commerce is liable to the extent therein provided to an employee injured while assisting in carrying on such commerce when the injury results from the negligence of a fellow servant, if such fellow servant is also engaged in interstate commerce. The facts disclosed by the complaint do not make it necessary to decide whether, if injury should result through the negligence of an employee engaged in intrastate commerce, there would be a liability under the act. The purpose to render a carrier engaged in interstate commerce liable to employees so engaged being apparent, the provisions are separable, whatever be the rule regarding an injury resulting to an interstate employee from the negligence of an employee not so engaged.²

CONSTITUTIONAL LAW—POLICE POWER—BOARDS OF TRADE—WEIGHTS AND MEASURES.—1. The conduct of its business by a board of trade formed to enforce, as between its members, a high standard of business dealings, may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that are likely to occur, without unconstitutionally interfering with the liberty of contract to which its individual members are entitled. 2. The Missouri Statute making criminal any deduction by the purchaser from the actual weight of grain, seed, hay, or coal, under a claim of right by reason of any custom or rule of a board of trade, is a valid exercise of the police power.³

CONSTITUTIONAL LAW—REGULATION BY STATE OF TELEGRAPHS.—A state may forbid a telegraph company from limiting its liability for negligence. This is not an invalid regulation of commerce nor a denial of the privilege and immunities of citizens of the United States and the equal protection of the laws is not denied telegraph companies and the persons with whom it does business by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state, although express companies and other common carriers may, by contract, limit their liability in this respect.⁴

CORPORATIONS—TERMINATION OF CHARTER—CONTINUING BUSINESS.—1. Where a corporation continues to act and carry on business after the termination of its charter period, taking no steps to close up its affairs, its stockholders will be regarded as doing business as partners and

¹ Ill. Cent. R. Co. v. Kentucky, 31 S. C. Rep. 95 U. S.

² Zikos v. R. Co., 179 Fed. 893.

³ House v. Mayes, 31 S. C. 235 U. S.

⁴ W. U. Tel. Co. v. Com. Mill Co., 31 S. C. 59 U. S.

will be personally liable for debts. 2. Where a corporation's charter has expired, two years will ordinarily be regarded as a reasonable time to close up its business, and where no attempt is made to do so, and the corporation is permitted to continue business as before, the stockholders will be estopped to claim that two years is not a reasonable time."¹¹

COVENANTS—BUILDING LINE—INJUNCTION.—1. A covenant that the building line of a square shall be not less than 25 feet from the true street line, it being understood that the front wall of the building shall be set back at least 25 feet from the street line, is breached by the erection of a bow window projecting over the line, the foundation of which, in common with the remaining outside walls, rises from the ground, and which extends up two stories. 2. A front porch, consisting of an open frame structure resting on brick piers, is not a breach of the building line covenant, under the rule that the language of a deed is to be construed liberally in favor of the grantee. 3. A mandatory injunction, prohibiting an encroachment and ordering an abatement of a structure which constitutes a violation of a building line covenant, will not be denied on the ground that it inflicts hardship on the defendant, and that the plaintiff should be left to the remedy at law for damages for breach of the covenant."¹²

ELECTIONS—"BRIBERY".—Purchase of a voter's certificate of registration to prevent him from voting at an election constitutes bribery under a statute declaring that any person guilty of receiving a bribe for his vote at an election or for services or influence in procuring a vote shall be fined, etc."¹³

EMINENT DOMAIN—ATTEMPT TO CONDEMN RAILROAD'S RIGHT OF WAY TO CONSTRUCT STREET LONGITUDINALLY ALONG IT.—1. Where a city had only general charter power to open, lay out, establish, widen, alter, extend, vacate or close streets, and to appropriate and condemn private property therefor, it had no authority to condemn a part of a railroad's right of way to construct a street longitudinally along the same, especially where there was no provision for joint use of the property by the railroad company and the public. 2. Where a municipal corporation without statutory authority was attempting to take a portion of complainant's right of way for a street, and thus to deprive complainant of its property without due process of law, a Federal court had jurisdiction of a suit to restrain such action."¹⁴

HUSBAND AND WIFE—ACTIONS BETWEEN—ASSAULT.—The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person, by the District of Columbia Code, authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried."¹⁵

INCEST—UNCLE AND NIECE BY MARRIAGE.—Sexual intercourse between an uncle and niece related only by marriage and not by blood is not incestuous within the Indiana State statute providing that if any uncle shall have sexual intercourse with his niece, having knowledge of his relationship, or if any niece shall have sexual intercourse with her uncle,

¹¹ *Ewald Iron Co v. Com.*, 131 S. W. 774 Ky.

¹² *Spilling v. Hutcheson*, 68 S. E. 250 Va.

¹³ *Com. v. Glass*, 131 S. W. 494 Ky.

¹⁴ *Portland R. Co. v. City*, 181 Fed.

632.

¹⁵ *Thompson v. Thompson*, 31 S. C. 110 U. S.

such niece being over the age of sixteen years and having knowledge of her relationship, he or she shall be guilty of incest."¹¹

INSURANCE, ACCIDENT—DEATH WHILE INTOXICATED—BURDEN OF PROOF.—When last seen alive, the insured was under the influence of intoxicating liquor, and the probabilities were that he met his death by drowning on the same day, as nothing was seen or heard of him until his body was found in the river near by in the following spring, greatly decomposed, but without any marks of violence. The policy contained a provision that if the insured met his death while under the influence of intoxicating liquor the claimant should only be entitled to one-tenth of the amount of the policy and the defendants made a tender of the one-tenth before action. *Held*, that the burden of proof was upon defendants, and that, as there was no evidence to show exactly when the death took place, this defence failed."¹²

INSURANCE, LIFE—REQUEST OF AUTOPSY—EVIDENCE.—In an action on a life policy involving an issue as to insured's health when the policy was issued, it was error to exclude insurer's written request to plaintiff to consent to a post mortem examination on condition that, if it should appear that decedent was in good physical condition, or it should not be definitely determined that he was not, the defense would be abandoned; since the evidence in connection with plaintiff's refusal of the request warranted an inference against plaintiff as to insured's condition when the policy issued, unless her refusal was due to reasons disconnected with the issue."¹³

INSURANCE, FIRE—GASOLINE "STORED OR KEPT" IN BUILDING INSURED.—A policy of insurance against fire was made subject to a condition that "The company is not liable . . . for loss or damage occurring while . . . gasoline . . . is . . . stored or kept in the building insured." A disused gasoline cooking stove had been put away in the building with about a pint of gasoline in it. Some time afterwards it was used for a special purpose, and caused a fire by which the building was destroyed. *Held*, that gasoline was not "stored or kept" in the building within the meaning of the condition, and that the insurance company was liable on the policy."¹⁴

INSURANCE, FIRE—MORTGAGED PROPERTY—ASSIGNMENT OF MORTGAGE—RIGHTS OF ASSIGNEE.—1. When a mortgagee, insured against loss by fire under a contract between himself and an insurance company, transfers the mortgage, his insurable interest is gone, and an attempt to assign all his interest in the contract, after a building on the mortgaged premises has been destroyed by fire, to a subsequent holder of the mortgage, does not transfer any interest upon which the transferee can sustain an action at law, for the assignor has no interest to assign. 2. The assignment of the mortgage does not transfer the contract of insurance, where the written transfer does not, in terms, undertake to assign it, but is limited to the transfer of the mortgage, and the assignee of the mortgage has no right of action at law as mortgagee to recover for a fire loss."¹⁵

INTOXICATING LIQUORS—SALE—RAKE-OFF—DEVICE.—C. occupied an underground room, in which he conducted a game of "stud poker." Persons would buy poker chips from him, and gamble with them. Beer was furnished by C. to those engaged in the play, without any cost to the players, except the price which they paid for the chips at the beginning

¹¹ State v. Tucker, 93 N. E. 3 Ind.

¹² Thompson v. Ins. Co., 103 L. T.

¹³ Haines v. Ins. Co., 20 Man. Rep. 69 Man.

153, Eng.

¹⁴ Lee v. Ins. Co., 92 N. E. 709 Man.

¹⁵ Weinberger v. Ins. Co., 76 Atl.

342, N. J.

of the game. At the end of each game C. would take a portion of the chips as a rakeoff. The chips remaining in the hands of the winners at the end of the game would be "cashed in" or redeemed. C. contended that the "rake-off" was not for the price of the beer furnished, but was intended as compensation for maintaining the place of amusement. *Held*, that it was a sale of liquor and C. was properly convicted.²⁰

LARCENY—JURISDICTION.—Where trunks in the possession of a carrier were wrongfully opened by one of its employees in North Carolina or Virginia and certain articles taken therefrom with felonious intent, defendant can not be found guilty of larceny committed in the District of Columbia, notwithstanding the jewelry was brought by defendant into the District and here converted by him to his use.²¹

MASTER AND SERVANT—ACCIDENT IN COURSE OF EMPLOYMENT—PRESUMPTION.—A seaman, employed in a ship which was lying in a harbor, left his berth on a hot night saying that he was going on deck for some fresh air. Next morning his dead body was found in the water close to a part of the ship where there was evidence that he was in the habit of sitting on the rail. There was no evidence as to how he got into the water. *Held*, that it was not a necessary inference from the facts that his death was caused by an accident arising out of his employment, and that the shipowners were not liable to pay compensation to his widow.²²

MASTER AND SERVANT—WRONGFUL DISMISSAL—MISCONDUCT—CONDONATION.—1. When the actions of a servant have been such as to raise a strong prima facie case of misconduct, sufficient to justify his master in dismissing him, the burden of proof is shifted to the servant to show that his conduct is susceptible of an innocent interpretation. The taking of a secret commission being such misconduct as would justify dismissal, the rights of the master are not affected by the fact that the servant, when he took the commission, was not occupying the same position as he was occupying at the time of the dismissal. 2. A master will not be held to have condoned the misconduct of his servant because he believed the servant's denial of the misconduct imputed to him, and continued him in his employment without making further inquiries which would have disclosed the truth, but is justified in dismissing him at a later date, when the true facts have come to his knowledge.²³

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—MINOR.—Minority places the injured person in the same position as an inexperienced adult so far as machinery is concerned, and where the danger is apparent, or the servant has been warned of the danger, negligence will be imputed to a minor, as well as an adult, if any injury is received from the machinery.²⁴

MORTGAGES—TAX TITLES—REVERSAL OF JUDGMENT.—Plaintiff instituted an action to foreclose a mortgage, making W., the mortgagor, and V., the holder of a tax title, defendants. Judgment was given for plaintiff in the lower court, and V. took an appeal. No supersedeas bond having been given, the property was sold to plaintiff under execution; subsequent to this, and while the appeal was still pending, the property was sold to pay taxes, and it was purchased by plaintiff. The upper court decided the mortgage invalid, and the case was reversed and remanded. The lower court then gave judgment for plaintiff on his tax title. On

²⁰ State v. Collins, 68 S. W. 268 W. Va.

²¹ Brown v. U. S., 38 Wash. L. R. 732 D. C.

²² Marshall v. The Wild Rose, 103 L. T. 114 Eng.

²³ Federal Supply Co. v. Anghern, 103 L. T. 150, Eng.

²⁴ Krisch v. Richter, 130 S. W. 187, Tex.

appeal, reversed, and *held*, V was entitled to a restitution of the property and to an accounting.²⁸

NATURALIZATION—FREE WHITE PERSON.—The term "free white persons," within the statute making naturalization provisions applicable to such persons, comprehends a Syrian, who is a native of Palestine and a Maronite; the term "white" being intended to be applied in its popular sense, to denote at least the members of the white or Caucaasian race.²⁹

NEGLIGENCE—DANGEROUS PREMISES—BUILDING LET OUT IN FLATS—OUTSIDE LIFT FOR GOODS PROVIDED BY LANDLORD—LIFT OPERATED FROM BELOW—INJURY TO SERVANT—LIABILITY OF LANDLORD.—The owners of certain flats provided for the convenience of their tenants a lift for the purpose of being used for the delivery of goods by tradesmen. The lift was in the form of a box with a weight on the top, and was pulled up and down from below. It ran outside the building in iron grooves, and communicated with the scullery windows of the different flats. The plaintiff a domestic servant employed by a tenant of one of the flats, was summoned to the lift to receive some goods. She was engaged in taking the articles from the lift, when it was pulled down from below and she was injured. The lift, which was of a usual pattern, was not out of repair at the time, and had been in use for eighteen years without any accident having occurred. The jury found that the owners of the flats were guilty of a breach of duty in supplying and maintaining a lift which was a source of danger to those likely to use it, and judgment was entered for the plaintiff. *Held*, that upon the above facts the defendants had not been guilty of any negligence, and the plaintiff was not entitled to recover.³⁰

NEGLIGENCE—DEFECTIVE GAS PIPE—PROXIMATE CAUSE.—Where an explosion of gas results from joint negligence of a gas company in discovering and repairing a leak and of another in bringing a light in contact with the gas, a third person injured may recover from either or both, they being severally and jointly the proximate cause; and hence, on a suit against a gas company for injury to a restaurant patron caused by such an explosion, it was not error to refuse to submit the company's interrogatories designed to show that an open fire caused the explosion.³¹

NEGLIGENCE—PUBLIC CHARITY HOSPITAL.—A corporation which erected and maintained a hospital from charitable donations admitting every one, irrespective of ability to pay, is a public charity, and not liable for personal injuries caused by the negligence of a nurse, though the person injured was a pay patient, and one-third of the hospital space was devoted to pay patients.³²

PHYSICIANS—ORDINANCE REQUIRING DEATH CERTIFICATES TO BE SIGNED BY DOCTOR OF MEDICINE.—The provision of the Sanitary Code of the City of New York that no burial permit shall be granted without filing a certificate of death signed by a physician on whom the degree of doctor of medicine has been conferred is valid, notwithstanding it is discriminatory when applied to one licensed to practice osteopathy.³³

PICKETING—MUNICIPAL ORDINANCE—POLICE POWER.—A municipal ordinance declaring that "picketing," for the purpose of intimidating and threatening the employees of a private industrial concern, is a misdemeanor, is a valid exercise of municipal power.³⁴

²⁸ National Surety Co. v. Walker et al., 125 N. W. 338 Ia.

²⁹ Powell v. Thorndike, 102 L. T. 600 Eng.

³⁰ Re Ellis, 179 Fed. 1002.

³¹ Merrill v. Gas Co., 11 Pa. 534 Cal.

³² Gable v. Sisters of St. Frances, 75 Atl. 1087, Pa.

³³ Bandel v. N. Y., 124 N. Y. S. 869.

³⁴ Ex parte Williams, 111 Pac. 1034 Cal.

PRINCIPAL AND AGENT—COMMISSION ON SALE OF LAND—NECESSITY TO GET PURCHASER BOUND IN WRITING.—When the agent has found a purchaser ready, willing and able to carry out the purchase for the price and on the terms stipulated for by his principal, he will be entitled to his commission, although he has not secured a deposit or got the purchaser bound by any writing, in a case where the principal, after being informed of the willingness of the purchaser to buy, simply ignored the agent and dealt directly with the purchaser by selling the land to him at the stipulated price less the commission.^a

PRINCIPAL AND AGENT—IMPLIED OBLIGATION OF AGENT—IMPROPER USE OF INFORMATION OBTAINED DURING EMPLOYMENT.—A, being employed as agent of B on commission to procure orders in a defined territory for the purchase of B's goods, agreed that he would to the best of his ability serve their interests. He rented an office in his own name for the purposes of the business and paid the rent himself. During his employment, A prepared a mailing list of customers and prospective customers in his own territory for use in carrying on B's business, also a card index of 500 or 600 names of such customers, and he kept a ledger containing particulars of sales made for B. During the last three months of his employment, A made an agreement with another firm in the same line of business as B to enter their service on the expiration of his then current engagement and made use of the information in his possession to the detriment of B in many ways and planned to take with him to the other firm as much as possible of the business worked up by him for B. B on learning of this, dismissed A, entered his office and took away or destroyed the mailing list, card index and ledger above referred to, and also a list A had prepared of likely calendar buyers all over Canada chiefly outside of A's territory. *Held*, (1) A was entitled to damages for the trespass committed by defendants in entering his office, fixed at \$50, and for the destruction of the list of likely calendar buyers, fixed at \$250. (2) B was entitled to damages on his counterclaim against A for breach of his agreement to serve his interest to the best of his ability, on account of his conduct as above stated, fixed at \$500. (3) The mailing list, card index and ledger were the property of B and A could not recover anything in respect of them.^a

RAILROADS—FEDERAL ACT—EMPLOYEES' ACCEPTANCE OF RELIEF BENEFIT.—1. A contract of employment entered into by a railroad company and an employee whereby the employee agreed that, in the event of the acceptance by him of the relief benefits to which the contract referred, the company would be relieved of all liability on account of his injury, is within the terms of section 3 of the Employers' Liability Act of June 11, 1906, whereby it is provided that "no contract of employment, . . . relief benefit, . . . nor the acceptance of any such insurance, relief benefit, . . . shall constitute any bar or defense to an action brought to recover damages for personal injuries to or death of such employee," etc., but giving the carrier the right to set off in such action any sum it may have contributed toward such insurance, relief benefit, etc. 2. The provisions of section 3 of said act of June 11, 1906, so interpreted, are valid and not an unjustifiable encroachment by the law-making power upon the right of free contract guaranteed in general terms by the fifth amendment.^a

RAILROADS—NUISANCE—ROUNDHOUSE YARD.—Where a railroad company maintained certain tracks in its roundhouse yard on which it stored, blew

^a *Ross v. Matheson*, 19 Man. L. R. 351 Mass.

^a *Martin v. Brown*, 19 Man. Rep. 680, Man.

^a *McNamara v. Washington Co.*, 38 Wash. L. R. 343 D. C.

out, cleaned, and fired engines, while not in use and in the open air, which constituted a nuisance to adjoining property, the railroad's acts were committed in its private and not in its public capacity; and hence it was liable to such adjoining property owners for the damage sustained without reference to whether its conduct was negligent or not."

RAILROADS—INTERSTATE COMMERCE—SECTIONHAND.—A sectionhand working on the track of a railroad, over which both interstate and intrastate traffic is moved, is employed in "interstate commerce" within the meaning of the Federal Employers' Liability Act, and within its protection.²⁷

SALES—DESCRIPTION—RESALE—WARRANTY.—B sold to A by sample a quantity of "common English sainfoin" seed. One of the conditions of the contract was: "Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them." The seed was delivered and accepted and was resold by A to several purchasers as "common English sainfoin." The seed was in fact that of "giant sainfoin," which is very different in character from, and of less value than the other seed. The two seeds are practically indistinguishable by any examination practicable on a sale, and the difference was only discovered when the seed was sown and came up. A had to pay damages to their purchasers for breach of contract, which they sued B to recover. *Held*, that A, having so dealt with the seed as to make its return impossible, could not recover damages for breach of the condition that the seed should answer the description in the contract of sale, and that B was protected by the clause in the contract from any claim for damages for breach of warranty.²⁸

SURETYSHIP—BONDS SECURING PERFORMANCE OF GOVERNMENT CONTRACTS—RIGHTS OF MATERIALMEN.—The surety in a bond securing performance of a contract with the United States, which bond, as required by statute, contains a stipulation for prompt payment to persons furnishing labor or materials in the prosecution of the work, is not relieved from liability to a party supplying materials to a subcontractor by the failure of such party to proceed against the subcontractor when the respective amounts became due or to promptly notify the contractor of the default, where it appears that the contractor knew the subcontractor was getting the materials on credit, and there was no unreasonable delay on the part of the materialman in giving notice of his claim to the contractor and surety.²⁹

TELEGRAPHS—FAILURE TO DELIVER—PROXIMATE CAUSE—MEASURE OF DAMAGES.—Where plaintiff requested a loan to prevent a sale of her property at a loss to pay a matured debt, and requested information as to whether the loan would be made at once by wire, and, obtaining no message by reason of the telegraph company's negligence in failing to promptly deliver a message stating that the loan would be made, plaintiff sold her property at a loss, she was not limited to a recovery of nominal damages for the telegraph company's delay on the theory that her actual loss was remote, uncertain and speculative.³⁰

²⁷ *Terrell v. R. Co.*, 66 S. S. 55, Va.

²⁸ *Wallis v. Pratt*, 103 L. T. 118 Eng.

²⁹ *Zikos v. R. Co.*, 179 Fed. 893.

³⁰ *Heine Safety Boiler Co. v. U. S.*, 38 Wash. L. R. 340.

³¹ *West. U. Tel. Co. v. Lawson*, 182 Fed. 369.

THE DOCKET.

AFTER a man has reached the ordinary length of life as laid down by the Psalmist, is he under a duty to stop earning money and to let other and younger people have a chance? Our law would answer this question in the negative. A negligent injury to a professional man of seventy who was earning a large income, which injury prevented him from practicing his profession any longer would be recompensed in our courts by a consideration of the expectation of life and the probable amount of his future earnings had the injury not occurred. But in France the rule seems to be different. A Parisian physician of seventy who had settled in a fashionable district of the city was going his rounds in his brougham, when the vehicle was run into and upset by an automobile. The doctor was very badly hurt and for nine months he was unable to visit a single patient. In an action against the automobile owner for damages he claimed something like \$20,000 for medical attendance, \$10,000 for the three-quarters of a year that he could not earn any fees and \$30,000 for the diminution of the clientele in the future, owing to the time during which he had been kept from his study, and to weakness, which would prevent him from doing as much work as he did before the accident. The Court in its judgment says that most physicians, when they get to the plaintiff's age, after a long and honorable career, which had not been devoid of profit, aspire to a well-deserved repose, and, without giving up their practice from one day to the other, gradually diminish the fatigue that it entails. Hence they gave him only his payments for medical attendance and \$10,000 for the nine months' incapacity to work. The difference between the French and American judicial view is plain and easily understood; it illustrates the difference in habits and customs—the European habit to enjoy a well-earned rest in the evening of life; the American habit of the successful business or professional man, to remain in the game to the last; to stick to the ship with his hand on the wheel until he falls dead of apoplexy or heart-failure.

AN English High Court judge has got himself into a lot of trouble by talking politics to the grand jury during the recent heated electoral contest in Great Britain. No sooner had Parliament assembled than a member of the House of Commons interrogated the government, asking if the speech had been correctly reported and what was the government going to do about it. The

Prime Minister replied that the attention of the government had been called to the incident and that the member could be sure that they would deal with the case as it deserved. What will be the fate of the offending judge, whether he will lose his position or be reprimanded only, is in doubt; but the tenure of an English judge, though he is appointed for life, is not really as secure as our appointed judiciary or our elected ones, while their terms last. The only way that an American judge can be removed is by impeachment before the Federal or State Senate, as the case may be, a method which is rarely attempted and hardly ever successful. Impeachment is the remedy in England, where it is sought to punish the judge, as well as remove him. Proceedings were pending before the House of Lords to impeach Lord Bacon when he pleaded guilty and was sentenced to a fine of \$200,000 and imprisonment in the Tower during the pleasure of Parliament. And the other English chancellor of infamous fame, Macclesfield, was impeached by the Commons, tried by the Lords, and fined \$150,000. But where the judge has been guilty of no crime which deserves a fine or imprisonment, but circumstances justify his removal, as where he is continually absent from the country or so old or so infirm as to be unfit for the performance of his duties; or where he has committed acts which disqualify him for the judicial office, in these cases he may be removed by the King on an address by the Houses of Parliament. The last incident of this kind in Great Britain was the case of an Irish Admiralty Judge in 1830; but the English judges are careful not to outrage public opinion. An English judge would hardly dare to withhold his opinion for months or years as American judges so often do, with an absolute disregard of the rights of the suitor to a speedy decision and of the words of the Constitution that "justice shall be administered without delay."

The DOCKET soon found in his study of English opinion, as to courts and lawyers, that the idea that a judge is above criticism and that a court shall not be attacked, no matter how its administration of the law shall outrage public opinion—an idea very often advanced in the United States—that this feeling does not prevail in England. Nor do the judges themselves seek any such exemption; on the contrary, they invite criticism. Only last fall, speaking at the Guildhall, in London, Chief Justice Alverstone, said: "We, the judges of the land, do not regret criticism; we expect it. All we ask our critics to do is to remember that we cannot reply, that we do not intend to excuse ourselves or to justify our conduct by any public utterance; but we do ask them to try to understand before they criticise, the way our law is made."

DISCUSSING the absurdly technical decisions of the early English courts and some of the modern American courts, an English judge said to the DOCKET last summer: "I am indeed surprised that your people put up with such things. I am sure ours would not. I should really be afraid to hold that because a word was left out of an indictment the prisoner had a right to go free, for somebody would be sure to get up in Parliament the next day and suggest that the government should inquire as to whether I was really competent to administer the law of the land; and if it should call upon me to defend myself I don't know how I could do it."

BUT the right of freedom of speech even concerning a judicial officer may be preserved without going to the extreme of taking away entirely all judicial independence. How far democracy is a failure, how far the people are to be trusted to govern themselves, is a very unsettled question at the present day. The Governor of Missouri has just vetoed an act passed by the legislature of the state giving to the people of the larger cities the right to choose, by popular election, their boards of police commissioners. In a strong message he shows many of the evils which would arise if the people were allowed to select their own officers, instead of having them selected for them by a wise executive; but it is such a paper as Grenville might have sent to George III in reply to the claims of the American colonists, and such a one as the Czar of Russia would heartily endorse today. The truth is that while we call ourselves a democracy, we are nothing of the kind, and our distrust of popular laws is shown in the many limitations which our state constitutions contain upon the rights of the majority to pass laws. But there is now looming up in different parts of the United States an extreme idea of popular government, known as the "recall." Think of a judge being subject to be removed in this way, as is proposed by the constitution of one of our newest states. You might as well decide civil and criminal cases by ballot just as you select a mayor. Perhaps this is only a passing public whim. An old friend of the DOCKET and one of the leading members of the bar of this state, thinks that the recall will have but short life in this country and that it can only thrive in an atmosphere of constant agitation. Its natural habitat would be in the bogus republics of South America, where political officials are liable to be recalled with every change of the moon.

AND the DOCKET's friend asks: As it is difficult enough now to induce men of high intelligence to accept office, how would it be under this recall system? Then ability to form correct opinions

on questions that might arise would be of little avail, nor would careful study of such questions amount to anything. High qualifications and honest purposes would not control, but if at any time a small per cent of voters should sign a petition, the faithful, intelligent, courageous officeholder would be compelled to retire necessarily under a cloud, or incur the expense and take his chances again with other candidates for re-election. Could it be expected that self-respecting men would care for office, or accept it even, under such circumstances? What could be more unstable, or furnish finer opportunities for the grafter and the unscrupulous agitator? We now have laws for the removal of dishonest officials. If there is danger from inefficiency, this can be corrected by the people at the polls. While we want honesty and efficiency, we equally want order and stability. To be progressive toward the shooting Niagara may be most hazardous. It is hard to understand on what theory this recall system can be viewed other than as a dangerous, political heresy. Was it not conceived as a plan to get rid of the courageous officer who dared to stand up and defend the right as he saw it, rather than a plan to dislodge the unfaithful and inefficient? Must the man in office discharge his duty with fidelity and with a high determination, or must he crouch before the angry cry of the street? Shall our judges form their opinions from the political incendiary, firing the public mind, rather than from rules of legal procedure?

A FRIEND and a reader of the REVIEW and a judge of the State of Pennsylvania, explains in a communication to the editor why it is that the judges of the American courts do so little to prevent trial by newspaper.¹ The DOCKET, he says, is perfectly correct in stating that the law is the same in principle in this country as in England: a publication which improperly interferes with the administration of justice is a contempt here as well as there. But in many states a number of things stand in the way of punishment for contempt. Our people have long been jealous of the courts and have curtailed their so-called arbitrary powers. Summary punishment for contempt of court in Pennsylvania, for instance, is limited by statute to the misconduct of officers of courts, disobedience to lawful process and misbehavior in the presence of the court. No publication out of court concerning any cause depending therein renders the publisher liable to attachment and summary punishment. If a newspaper publication improperly tends to bias the minds of judges or jurors, the person aggrieved must proceed against the writer or publisher by indictment or bring an action for damages. This statute renders it next to impossible for the court to protect either itself or the accused, for

¹ *Ante*, Vol. 44, p. 941.

the jurors in the contempt proceeding may be subject to the same improper influence as those who tried the original defendant.

ANOTHER difficulty which he points out is that writs with us do not run over the entire country as they do in England. The jurisdiction of our courts is limited and circumscribed by state lines. "I imagine," he says, "a judge in East St. Louis would find some trouble in bringing before him a St. Louis editor who had tried and condemned a person in his newspaper."

NO CRIMINAL case in recent years, tried in a foreign country, has caused such general interest and attention among the lawyers of the United States as the notorious Crippen case. The sensational capture of the murderer through the agency of wireless telegraphy before he could land at Quebec from the vessel on which he had sought to escape, made the case the talk of two continents; but the interest to the American lawyer has lain in the promptness and certainty with which his crime met its punishment. The DOCKET is in receipt of a multitude of communications from his brethren of the American bar on the subject. All of them are concerned with the absence of delay in the proceedings and ask the DOCKET to give a chronological account of the various steps in the case. Most of them contrast the celerity of the English courts with the delays in our own and want to know why we cannot in this country attain to something like this in the way of judicial procedure. Others having read in the newspapers that the evidence was weak and having seen it stated that Crippen would not have been convicted had it not been that the chief justice practically told the jury to convict, ask information on this subject also.

THE DOCKET is glad to be able to answer these questions. He has all the necessary data before him—a report *in extenso* of the trial, including all the evidence, the arguments of the counsel and the charge of the chief justice; also a full account of the argument and judgment in the Court of Criminal Appeal.

HERE are the facts, in brief: Dr. Crippen, an American by birth and a graduate of a medical school in Ohio, had been a resident of London for some years, acting as an agent of an American patent medicine company. Cora Crippen, his wife, had formerly been an actress. They were living together in London when early last summer she disappeared. At first he told their friends that she had gone to America; later he published a death notice in the London papers that she had died in California. During this time he had become intimate with his stenographer, Ethel

LeNeve, making her presents of jewelry and supporting her. Mrs. Crippen's friends became suspicious, notified the police, who visited the Crippen house, interviewed the husband, but found no evidence on which to arrest him. Subsequently, Dr. Crippen and Miss LeNeve disappeared from London, and, on July 13th, their flight caused the police to dig up the cellar, where human remains were discovered under the floor. Some time afterwards, in August, he was arrested with his companion at Quebec, brought back to England and indicted for the murder of his wife, on October 12th, just after the summer vacation. On October 18th his trial began at the Old Bailey before Chief Justice Alverstone, and on October 22nd he was found guilty by the jury and sentenced to death. On November 5th his appeal was heard in the Court of Criminal Appeal, before three judges and the conviction was affirmed. On November 26th he was hanged.

THE courts of Missouri present at this very time an American *cause celebre*, and an opportunity to compare Missouri methods with English methods—the case of Dr. Hyde, charged likewise with murder by poison. Here the prisoner's victim died in October, 1909, the trial began in the Criminal Court of Kansas City on April 16th, 1910, and the verdict of guilty was reached on May 16th. On July 5th the trial judge overruled a motion for a new trial and sentenced the prisoner. On February 6th, 1911, the argument before the Supreme Court began and lasted several days. The judgment of the Supreme Court has not yet been delivered.

LET us note the different periods of time in the different stages of the proceedings in each case. Crippen was indicted three days before the trial—Hyde thirty days; Crippen was sentenced ten minutes after the verdict was rendered; but it was seven weeks after the verdict in the Hyde case before the judge sentenced the prisoner. Crippen's case was argued in the Court of Criminal Appeal two weeks later; Hyde's case was not argued in the Missouri Supreme Court until six months after the sentence of July 5th. The arguments in the Crippen case lasted about three hours, and the judgment of the Court of Criminal Appeal was rendered immediately on its conclusion; the arguments in the Supreme Court of Missouri in the Hyde case lasted seven days and the Supreme Court has not yet rendered its decision.

UPON whose shoulders rests the most of the blame for the long delays in our courts is a question frequently asked. Some of it is doubtless the fault of the lawyers, some of it arises from our written codes of procedure with their numerous details; but it would seem after all that the greatest offenders are our judges.

How does it happen that the judge before whom a case is tried cannot make up his mind whether the proceedings which he witnessed and of which he was a part and had the power to control, had been properly conducted until seven weeks have gone by? The chief justice of England sentences Crippen immediately after the verdict is rendered; the Kansas City judge delays the sentence of Hyde nearly two months. When the Crippen case is argued in the Criminal Court of Appeal the three judges of that court think themselves competent to deliver their opinion at the close of the argument; but the judges of the Supreme Court of Missouri require weeks and months to come to a conclusion. Is it that our judges are wanting in intellectual capacity and legal knowledge? The DOCKET does not believe that the standard of legal education is higher among the leaders of the bar of England than among the same class of lawyers in the United States, and he believes that our best judges are as learned in the law as any that England can boast; but it would seem that our judges are not so sure of themselves as the English judges are, else they would hardly feel it necessary before giving an opinion to have to ransack the law books to see what the law really is and whether it is or is not what it was said to be by the counsel on the argument.

REGARDING the second question propounded by our correspondents, it is true that all the evidence upon which Crippen was convicted was circumstantial, but here are the facts, as set out in an English law journal, upon which the conclusion was reached that the body found in the cellar of the house was that of Cora Crippen.

1. Buried beneath the floor of the house in which she was last seen is found the mangled flesh of a human body. The bones have been removed and the flesh is covered with quick lime, but; owing either to the dampness of the soil or to the fact that the air has been excluded by the pressure of the bricks above the body, the quick lime has preserved the remains instead of destroying them.
2. Expert evidence shows that the remains are those of a stout, middle-aged person, such as Cora Crippen admittedly was.
3. The sex is ascertained to be female by the fact that hair curlers are found amongst the hair.
4. There is strong, though not unquestioned, expert evidence to show that the person whose remains have been discovered once underwent an operation in the abdomen. Now, Cora Crippen is proved to have undergone such an operation.
5. Although the exact date of the deposit of the remains cannot be exactly ascertained, the expert evidence shows that they cannot have been there more than eight or nine months before discovery. This is consistent with the fact that they are Cora Crippen's remains, since she disappeared on the 1st of February, whereas they were found in July.
6. They are wrapped in a pajama jacket which is proved to have been bought by her for

and that the Appellate Court will not be willing to override the discretion of the judge below unless satisfied that something unfair had been done by the prosecution in reserving the evidence tendered so late in the case. The court declined to limit the discretion of the judge to admit rebutting evidence to cases where something which could not have been foreseen arose out of the conduct of the defense, or to admit that the lateness of the stage at which the evidence was admitted was, in itself, a ground for reviewing the exercise of the judge's discretion.

As to the question of fact, the Appellate Court said: "We think there was evidence for the jury and a great deal of evidence which would justify the verdict at which they arrived." And as to the charge of the Chief Justice, it said: "The prisoner's counsel has said, in the course of his argument, that every point that had been made on behalf of the prisoner was put to the jury, and fully and fairly. But he has criticized a phrase used here and a phrase used there in the course of a long summing up. Sitting in this court we have often said in similar cases that we should not interfere where attention is called to phrases ambiguously used and not expressed quite so fully and clearly, or not expressed with the exactitude which, as counsel points out, might have been used. We must look and see whether, taking the summing up as a whole, the judge has put the issue fairly to the jury; whether all the evidence was before them, and whether the judge adequately directed the attention of the jury to where lay the burden of proof. * * * We think that, notwithstanding the criticism that has been leveled at the summing up, it did put adequately, fully and fairly the complete case for the prisoner, and that no injustice has been done by any term, phrase or sentence used in the summing up."

THE Crippen case in England and the Hyde case in Missouri seem to recall the words of Coke, quoted by Blackstone: "Of all species of murder, the most detestable is that by poison, because it can of all others be the least prevented either by manhood or forethought." Special punishment was provided for the offense of poisoning in the civil law. In Henry VIII's time poison was declared to be treason, punishable by boiling to death. This extraordinary punishment seems to have been adopted by the legislature from the peculiar circumstances of the crime which gave rise to it, for the preamble of the statute of Henry VIII informs us that John Rouse, a cook, had been lately convicted of throwing poison into a large pot of broth prepared for the Bishop of Rochester's family and for the poor of the parish, and the said John Rouse was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke, indeed, mentions several instances of persons suffering this horrid punishment. In 1547 all new

for friends and neighbors, and he looks upon it as his club, where he may associate in a friendly way with acquaintances, sip his beer, and smoke his pipe. He views it purely as a social matter. During all these years no drunkenness or disorder has resulted. Ardent temperance people, seeing that no evil results follow this practice in this community, have ceased all agitation on the subject. In short, the public sentiment of the city is in harmony with the view suggested by the applicant in his testimony. The applicant testified that as a matter of personal preference he would much prefer to close up his place on Sunday, but that when his 2000 competitors kept open he was obliged to do likewise or lose his patronage; that, if any effort were to be made on behalf of the municipality or the public to enforce the Sunday closing law, he would gladly acquiesce and close his place. Upon the hearing the learned district attorney was forced to admit that, in view of the state of public opinion in the city of Milwaukee, it would be impossible for the executive branch of the state government to enforce the Sunday closing act in this community. Public sentiment is still the all-compelling power, as it was when the Roman maxim proclaimed that 'the voice of the people is the voice of God.' Any legislature that establishes police regulations in defiance of public sentiment must suffer the humiliation of seeing their mandate disregarded. The question is whether, under all these circumstances, the court should find that the applicant has not behaved himself as a man of good moral character during the five years last past. * * * What is meant by good moral character? What standard does the statute contemplate? It is plain that it does not require the highest degree of moral excellence. A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Ordinary care is the test of liability in every case of negligence. This standard is arrived at, not by the overcautious or the reckless man, but by the average man, representing the great mass of men. So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people. Applying this test to the particular case, we find that the views and behavior of the applicant are in accord with the overwhelming majority of the people in this community. It is not contended that the applicant must be able to rise to such moral elevation that he may analyze, criticize, and reject the prevailing opinions and settled convictions of his fellow-men, and in the clear blue of righteousness choose for himself a course of action dictated by his quickened conscience. To meet such a test a man must be a philosopher, while the statute is satisfied with a citizen whose behavior is up to the level of the average citizen. There is nothing in the mental attitude of the appli-

cant, as disclosed by his examination, which would brand him as a deliberate lawbreaker. * * * It must be remembered that the act of keeping open one's saloon on the Sabbath is unlawful, not in and of itself, but merely because it has been prohibited by an arbitrary act of the legislature. Men of the highest moral character always have and always will differ as to the proper enforcement of sumptuary and police regulations. I cannot see that the applicant should be denied citizenship because he has fallen in with the general public sentiment of the community in which he lives. There is in the conduct and attitude of the applicant no moral turpitude, and nothing evincing a calloused conscience, and it would not, in my judgment, be a fair construction of the act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen. For these reasons, the objections will be overruled, and the applicant will be admitted to citizenship." ²

THE decision of the Federal Court of Colorado that beauty, as well as utility, is entitled to legal protection, and that a canon, a waterfall, a beautiful grove of flowers and trees forming a magnificent landscape, are not to be ruthlessly destroyed for the mere purpose of money-making, is one to be heartily commended by every citizen of the land. In the past we have cared very little for this kind of thing; many of our people would cut down a fine old tree with hardly less compunction than they would kill a poisonous reptile, and for two decades after the civil war our national architecture, as it was directed from Washington, and is illustrated in the custom houses, postoffices and other Federal buildings of that period, was simply hideous. But art is making its way in this country and the artistic feeling is extending and as our common law is based upon the feelings and habits and customs of the people, it is time for our courts to recognize these things. In the Colorado case a town company owned several hundred acres of land, which it improved at great expense, for a summer resort. On this land is what is known as Cascade Canon, through which a small precipitous stream flows. The mist and spray from its numerous falls produce a luxuriant growth of vegetation, which renders the canon, stream, and falls a thing of rare beauty, and attracts many visitors. But a business corporation for the supplying of electricity by waterpower claimed the right to take, under the power of eminent domain, the waters of this stream and to leave in its place a waterless bed and destroyed and ruined vegetation. But on complaint of the Town Company the Federal Court holds that the use of the stream in creating the falls and maintaining the verdure was a beneficial use within the con-

² Re Hopp, 179 Fed. 562.

FOREIGN CITATIONS IN THE WISCONSIN REPORTS. (58-140) Compiled by B. K. MILLER, of the Milwaukee bar.

This is one of those labor saving books which are addressed principally to the owners of sets of state reports. It covers nearly one hundred volumes of the Wisconsin Reports and gives all the citations of other reports, domestic and foreign, contained in the opinions in these one hundred volumes. The large number of foreign citations in the American judicial opinions is shown in the fact that this book, contains no less than six hundred pages.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898.—By WILLIAM MILLER COLLIER. Eighth Edition with amendments of 1903, 1906 and 1910, and with decisions to date by FRANK B. GILBERT, of the Albany bar. Albany, N. Y.: Matthew, Bender & Co.

This is another well known law book, though it has not the age of Perry on Trusts. The first edition was issued in 1898 and such has been the rapid changes in the law by amendments and otherwise that we have in twelve years no less than eight editions. The author's apology for a new edition in a year is given in the preface where he says: "The eighth edition of this work is made necessary by the important amendments to the Bankruptcy Act by the Act of June 25, 1910. Nearly two years have elapsed since the publication of the former edition and in that period, about five hundred bankruptcy cases have been reported, many of them very important. The amendments of 1910 were prepared by acknowledged experts in bankruptcy law, for the purpose of settling many disturbing questions, in respect to which a number of controversies had arisen, and of obviating the confusion which had arisen because of divergent views as to the compensation of receivers and trustees. These amendments are far reaching in their effect. They completely nullify many decisions which were controlling in the several jurisdictions. In view of the many changes thus made in the law, the publishers, in furtherance of their policy of keeping this work abreast of the times, could not do otherwise than cause a new edition thereof to be prepared and published."

Ordinarily it would seem rather an imposition on book buyers to issue a new edition so soon, but we feel compelled to admit that under the peculiar circumstances in the case the editor has made a good plea of justification. Every lawyer who practices in the bankruptcy courts is familiar with this work. It is not essential to go into details in regard to what it contains; it is sufficient to say that within its covers will be found the whole law of bankruptcy.

THE LAWS OF ENGLAND.—A complete statement of the whole law of England. By the Right Honorable, The Earl of Halsbury, Lord High Chancellor of Great Britain, 1885-1886, 1886-1892, and 1895-1905, and other lawyers. Vol. XII. Philadelphia: Cromarty Law Book Co. 1910.

These volumes have been reviewed in these columns as they appeared. The present volume contains four great titles: Equity, Estate and Other Death Duties, Estoppel and Evidence. The first, third and fourth will be valuable aids to our own lawyers, while the second ought to be of

interest to persons in all parts of the country who are studying better systems of state taxation and who believe that an inheritance tax is a far better means of raising revenue than our obnoxious and impotent personal property taxes. As this great work progresses, its wide range and the thorough manner in which it is carried on becomes more clear to the reviewer and it will remain for many years the best compendium of the laws of England for the practitioner and the student.

THE COMMERCIAL POWER OF CONGRESS CONSIDERED IN THE LIGHT OF ITS ORIGIN.—By DAVID WALTER BROWN, Ph. D. G. P. Putnam's Sons. New York. 1910.

This book is the result of an effort to discover the opinions and purposes of the men who framed the Constitution regarding the commerce clause of that instrument. Mr. Brown first devotes several chapters to the movements preceding the Constitutional Convention, beginning with the New Jersey Resolutions of 1778. He then considers the work of the convention and the interpretation of the commerce clause in the state conventions and the early sessions of Congress.

Mr. Brown shows how it came about that the movement to confer additional powers upon the Congress of the Confederation was changed into a demand for a strong central government, and indicates the significance of this change upon the interpretation of the powers of Congress over commerce. Instead of this power being conceived as limited to those regulations which were deemed essential and desirable in the early days of the government, its scope was extended so as to embrace the complete power of government control over such subject except in so far as limitations were placed upon the same by the constitution. He also traces the development of the plan to have Congress regulate commerce until it came to include express power over interstate commerce and commerce with the Indian tribes as well as foreign commerce, and concludes that it was the intention to make the power of Congress in the former fields as extensive as in the latter.

In a final chapter Mr. Brown shows from an examination of judicial decisions that the Supreme Court, when it came to pass upon the commerce clause, adopted a conception of the power of Congress as extensive as that which had prevailed in the Constitutional Convention and in contemporary opinion. The book is well written and the argument is supported by numerous references to authorities. It will be of particular interest and value in connection with the recent demand for new applications of the power of Congress to regulate interstate commerce.

THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY.—An Historical Essay on the Boundaries between Legislation and Adjudication in England. By CHARLES HOWARD McILWAIN, Thomas Brackett Reed, Professor of History, Bowdoin College. Yale University Press. 1910.

The dignified title and suggestive sub-title of this work are well borne out in its contents. Professor McIlwain has written a unique book the reading of which cannot fail to interest the lawyer of today who is in search of historical explanations of present day constitutional practices.

American students of the history of law in particular should be grateful for a work which throws such clear light on the origin and character of the present day attitude of the courts of law towards legislation in this country.

Professor McIlwain has, as a result of his careful and open-minded investigation, come to the interesting conclusion that the supremacy of the Parliament in the English system of government clearly dates from the middle seventeenth century instead of from a much earlier time. In order to establish this point he makes a careful and somewhat detailed examination of English constitutional and legal history relating to the problems of central administration. After a brief but suggestive preface in which the perspective of his work is furnished, the author gives us, in Chapter I, a scholarly discussion of the feudal rather than national character of Norman and early Plantagenet England and the relation of the early royal council to the parliament. A valuable note to this chapter discusses the advising and consenting powers of the judges in council. In his second chapter, Professor McIlwain clearly establishes the existence of a concept of fundamental law in later mediaeval and early modern England and the influence of the great constitutional struggle in modifying and changing this concept during the seventeenth century. Many interesting illustrations of the recognition of the fundamental law down to the time of Oliver Cromwell are given and the conclusion reached is that out of the civil war of the seventeenth century "grew the doctrine of legislative sovereignty which has had an unbroken history down to our own time." Evidences of the fundamental law and of the growth of the legislative sovereignty of parliament are furnished in the notes at the end of the chapter. Chapter III is devoted to an examination of the earlier functions of parliament as a court rather than a legislature under the five heads of, "The Fusion of Legislation and Judicature," "The Evidence of Words," "The Evidence Furnished by the Beginnings of the Commons and the Early Organization of Parliament," "'Acts' of Parliament," and "Parliamentary Privilege." The whole chapter shows clearly how difficult it was to distinguish between the older position and powers of parliament as a high court and its later acquired claims to legislative sovereignty. As in previous chapters the general argument is well fortified by special illustrations in the supplementary notes.

To the lawyer, and especially to the lawyer in this country where the traditions and practices of the older English have been so closely adhered to, the fourth chapter of Professor McIlwain's book will have special significance. It discusses the complicated relations of "Judiciary" and "Legislature," and shows how the pre-eminence of the latter over the former is a unique feature of modern English constitutional development, while in the United States the older and more historical viewpoint is reflected "in the great powers exercised by our courts, by virtue of their inherent character, or under the interpretation of the constitutional phrase, "due process of law." The whole chapter affords an interesting and timely explanation of the seeming lack of respect for parliamentary legislation by English judges in the past and for the survival of ideas and practices in the present that reflect the theory that judges and courts have the

right to safeguard and interpret the fundamental law. The notes to this chapter dealing with "Parliamentary Omnipotence and International Law," "Parliament as an Advisory Council," "The Delegation of Power by Parliament," and "Secondary Legislation in England," are all particularly valuable to the student of constitutional law. The fifth and final chapter of the work traces the political history of parliamentary supremacy from the time of the Tudors. In this connection the author takes occasion to criticise the real value of the concept of the omnipotence of parliament as the basis of modern English government and points out that "It is English, not universal, not even British," and that it is the product of conditions that have long ceased to exist and inadequate to the needs of the British Empire. As for the future, Professor McIlwain seems to believe that another constitutional revolution will surely take place whereby the theory of British government will more nearly coincide with the facts and the real power will reside in the commonwealth or state.

In conclusion, it is interesting to note how much a work like this clears and corrects our knowledge of the historical background of American law and constitutional practice. It proves the point now becoming generally recognized that "In America many of those traditional powers and functions have remained in the courts which in England have to a greater extent been excluded by the rigour of the doctrine of parliamentary sovereignty." We predict for Professor McIlwain's work a high place in the ranks of literature relating to English and American constitutional and legal development.

RACE DISTINCTIONS IN AMERICAN LAW.—By GILBERT THOMAS STEPHENSON.
New York: D. Appleton & Co. 1910.

"America has today no problem more perplexing and disquieting than that of the proper and permanent relations existing between the white and colored races." Yet, "The Negro Problem" has become a meaningless phrase in recent speech, for even persons who have a genuine interest in the Negro have little knowledge of the real problems of his race. The recent literature on the subject, with the notable exception of Baker's, "Following the Color Line," leaves the average reader in ignorance of the conditions which have caused so much agitation of the race question. Impressions formed from sensational news items have been responsible for the variance existing among people who were united in a desire to aid in the solution of the problem. A most valuable remedy for the situation has appeared in Mr. Stephenson's book.

This is the first succinct statement of the actual distinctions made between the races by the laws of the various states since 1865, and in the enforcement of these laws. While it is not especially written for lawyers, but rather for the general reader interested in public problems and for the student of the social and economic history of the South, it will prove a valuable reference book to the lawyer in general practice. The chapters on "What is a Negro?" and "Separation of Races in Schools," for instance, contain matter of very general interest. Such chapters as "Civil Rights of Negroes," and "Negro in Court Room," will prove par-

ticularly serviceable to the legal profession, though the style is so untechnical that their interest for the general reader is not lost. Fortunately, Mr. Stephenson abandoned his early idea of confining his investigation to the Southern states—as a treatise, its value is much greater; and in correcting the impression that distinctions exist and have existed in the laws of only southern states, its mission is much enlarged.

Many of the chapters appeared in the *AMERICAN LAW REVIEW* during 1909, but they are now presented in revised and completed form. The citations are also more copious, but have been conveniently relegated to the notes at the end of each chapter.

Two chapters on "Suffrage" and "Race Distinctions versus Race Discriminations" are now published for the first time. The first of these is a scholarly history of the long fight which began with the fifteenth amendment and which is not yet finished. Special attention is given to the constitutional phase of the suffrage struggle, and the author's mastery of constitutional law makes this an important part of the book. The suffrage qualifications in the various states are tabulated in usable form.

It is in the chapter on "Race Distinctions versus Race Discrimination" that the author expresses his personal views and gives his conclusions based on the facts of the preceding chapters. An erudite Southerner, whose intimate contact with various races in both North and South has given him a thorough understanding of the conditions, and sympathy with the people who are responsible for the destinations which have been made, no one in the New South is better qualified to speak on them. It is interesting to read that "if Negroes were in every way equally advanced with white people, race distinctions would probably be even more pronounced than now. . . . The result of the honest enforcement of race distinctions would be to the advantage of the weaker race. . . . The welfare of both races—and this conclusion applies equally to the other non-caucasian races—requires the recognition of race distinctions and the obliteration of race discriminations." However willing one may be to share in these conclusions, the investigation which has preceded them will be of lasting benefit to the country at large, and especially to the Negro race.

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- GROSS (H. G.). *Criminal Psychology*. Little, Brown & Co., Boston.
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- HALSBURY (LORD). *Laws of England*. Vol. 13. Butterworth & Co., London.
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All communications for the editor should be sent to

JOHN D. LAWSON,
14 South Broadway,
St. Louis, Mo.







THE AMERICAN LAW REVIEW.

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CHIEF JUSTICE WHITE.

Edward Douglass White by nomination of President Taft and confirmation of the senate has been made Chief Justice of the United States. A number of sketches of him have appeared, but none of them, I believe, have mentioned certain things of possible interest to the public, and certain other things of real importance. Let me try to tell of these things.

When the writer first met Mr. White he was practicing law in New Orleans. This was in 1878. Already he had won distinction at home, among his own people. At that time the leaders of the New Orleans bar loomed up large as legal lights in our southern sky. There were John A. Campbell, himself a justice on the supreme bench at the outbreak of the Civil war; Thomas Jefferson Semmes; Ernest B. Kruttschnitt, a nephew of Judah P. Benjamin; Edgar H. Farrar, whose picture adorned a recent number of the *AMERICAN LAW REVIEW*, and Edward Douglass White. How many other jurists south of Mason and Dixon's line came up to the measure of these men?

His large practice was due, of course, to Mr. White's ability, but it helped thereto, no doubt, that, although every inch an American, he spoke French fluently. It is doubtless well known to the reader that multitudes of people in

Louisiana have French for mother tongue. English they speak with some hesitation and more reluctance.

Nor is our new Chief Justice without interest in the classics. I remember well one or two conversations in which he sought guidance in reviving his college studies in Latin. What the result was I do not know, but it bespeaks a scholarly trend of mind that a lawyer, burdened with heavy practice, should want to turn aside to renew his classical studies.

Judge White's administrative work in behalf of higher education must not be forgotten. Our obligation to him here is very great. The University of Louisiana was ordered by the state constitution of 1845 to be founded in the city of New Orleans. Departments of medicine, of law, and of sciences and letters were gradually organized. Of the last named department the writer, on recommendation of the University of Virginia, was made dean in 1878. In 1882 Paul Tulane of Princeton, New Jersey, gave to seventeen administrators, among whom was Judge White, a considerable property to promote higher education in New Orleans. The writer proposed that the Tulane foundation be laid upon the university of the state. Judge White and a few of his colleagues championed the idea immediately, but others feared state control. By a narrow margin the resolution to consolidate passed the board of administrators, but when this action was submitted to Mr. Tulane he demurred. Again by a narrow margin the administrators reversed their former action. The situation seemed hopeless. Then came forward Judge White and a few others¹ with a proposition that the state give to the Tulane administrators all that it had accumulated in the University of Louisiana. What a proposition to make to a sovereign state! To compass this consolidation an act of the legislature and a constitutional amendment were indispensable. The writer, with considerable help but with a scarcely acquiescent state board, pulled hard on one side, and on the

¹ Prominent among them were Edgar H. Farrar and Charles E. Fenner.

tem: it seems like running a race with only one leg. Now Europeans have often stared at things in America and learned by the staring; but here, surely, they are right and we are wrong. But laying lamentation aside, let us rather rejoice that our new Chief Justice knows profoundly the two greatest systems of law that the wisdom of man has hitherto devised.

Nor should we forget that Judge White was called to the supreme bench by Mr. Cleveland and moved up in rank by Mr. Taft, both eminent jurists; and the latter preferment was confirmed by the senate—never lacking in able lawyers—immediately and unanimously. Indeed, waiving the precedent to refer appointments to a committee and going into executive session the senate confirmed him in fifteen minutes. It is a long stretch of time from John Marshall to Chief Justice White. In all these years only nine men have held this exalted position—probably the highest of its kind on earth. Precedent has been against moving up justices already on the supreme bench. In disregarding precedent here Mr. Taft has given another proof of that ripeness of judgment which induced many of us Democrats to vote for him as president.

When the writer first met Mr. White, he was living as a bachelor with his mother in the French quarter of New Orleans, which, although but a part of a larger whole, has itself perhaps 100,000 inhabitants. He was a devoted son. After his mother's death he married, rather later in life than most men do. He is a large man, standing some six feet high, and weighing 200 pounds, or more. His head, too, is massive. He is, indeed, superb looking. His manners are very courteous—genial but always dignified. Fond of a good story and of a good dish, he entertains hospitably. His home is noted in Washington for French cooking and fine dinners. He signs himself "E. D. White."

In high position the judge has not forgotten old friends. Some years after he went to the supreme bench, the writer, happening to be in Washington, staid over an afternoon to

see the court and to look on the face of an old friend. I did not dream that he would recognize me. Promptly at 12 m., with much ceremony and heralding by the clerk, all in official dress, the Chief Justice first and then the associates in order of appointment marched down the corridor into the courtroom. The writer, standing full of awe back against the wall, caught a quick glance from Justice White as the procession moved on. Later, when all were seated, a page came up to say: "Mr. Justice White wants to know if you are not Professor Jesse?" On hearing the reply he came to the lobby for a few moments. A hearty handshake; an invitation to dinner, which had to be declined for lack of time; a warm hug with big right arm; and he hurried back out of courtesy to the attorney, who was droning steadily on in argument.

Some years later the University of Missouri, during my term as President (1891-1908), wished to confer upon him the degree of Doctor of Laws. Dr. John D. Lawson, dean of our law school and editor of the *AMERICAN LAW REVIEW*, waited upon him to ask him to attend the next commencement and receive the degree. "Oh," said he, "that is Jesse's university. I will come with pleasure." At the same time a committee gave an invitation from our state bar association to deliver the annual address. To this he replied quickly: "Impossible, gentlemen; I must not now speak in public except from the bench; I thank you." In former days, surely, he was an impressive speaker. The illness of Mrs. White took them off to Europe before commencement time, and universities seldom confer honorary degrees *in absentia*; but the LL. D. was formally granted by unanimous votes; nothing is lacking but the public conferring of it.

Judge White is a sincere Christian. Religion with him is not a mere form. Like Chief Justice Taney, he is a member of the Catholic Church. Differ from him in creed we may, as most of us do; but all of us would do well to emulate his sincerity.

Let me close with a brief biographical summary: Born on a sugar plantation in Louisiana, November, 1845; educated in Maryland and at New Orleans, and at Georgetown, D. C.; member of Catholic Church; served in Confederate army; called to bar at New Orleans, 1868; appointed Justice of Louisiana Supreme Court, 1878; Democrat in politics; married; administrator of Tulane University, 1882-1894; elected United States senator, 1891; called by Mr. Cleveland from senate to Supreme Court, 1894; resigned from senate to take seat as Justice; named Chief Justice by President Taft, December, 1910; confirmed by senate unanimously!

COLUMBIA, Mo.

RICHARD HENRY JESSE.

FOUR UNIFORM COMMERCIAL ACTS.

Men have engaged in trade since history began, and the consummation of every transaction has demanded mutual submission to commercial rules. These rules, having their origin in custom, ever expanding, and constantly subject to judicial criticism, form the body of jurisprudence known as the law merchant. Law so developed necessarily affords a degree of certainty and uniformity; but doubt and pretence with respect to existence or extent of usage still induce frequent resort to the courts. The judicial process of moulding custom into law has not been rapid, and the suggestion has been made that inasmuch as judges are not ordinarily recruited from the ranks of trade, they are not keenly sensible of commercial expediency; that they are more or less inclined to apply standards other than commercial to the settlement of mercantile disputes. Whatever the reason, the development of the mercantile law has been attended by much conflict of doctrine, and marked confusion still exists.

Our country, consisting as it does of a group of independent sovereignties, with law-making and law-administering machinery, each legislating and deciding primarily for itself alone, is full of conflicting judicial decisions and divergent customs in the law commercial. Even if it were desirable, the federal congress would be powerless to enact a body of rules governing citizens of the various states in private mercantile relations and contractual engagements. Excluding the national tribunals, the commercial law declared by the courts is constitutionally that prevailing in the several states, and the adoption by them of a uniform body of rules enforceable in all, is of paramount importance. Obviously such a collection must be embodied in a code, with comparative rigidity, admitting the possibility of future dissent as to its construction and application; but by such

codification we can endeavor to make the game fair and the chances equal.

The agitation for uniform state laws has had such considerations for stimulus and objective. New York claims credit for practical inauguration of the idea. Its legislature passed in 1890 an act authorizing the appointment of commissioners for the promotion of uniformity of legislation in the United States. Their functions were to be limited to the consideration of uniformity in the subjects of "marriage and divorce," "insolvency," and "notarial certifications." But they were also to determine the desirability of inviting other states to participate in a convention to prepare a system of uniform laws.

The American Bar Association the same year recommended the passage by each state of a statute similar to that of New York, relating to subjects mentioned in its resolution. Since that time, twenty national conferences of commissioners appointed by the various states have been held, and the last conference (Chattanooga, August 25-9, 1910), was composed of delegates from forty-four states, two territories, the federal district, and three insular possessions. In twenty-six states, including Maryland, the commissioners are appointed under legislative authority. The conference has dealt exclusively with matters within the state, as distinguished from federal jurisdiction. Its deliberations have brought forth the following drafts of uniform acts, viz.: The negotiable instruments act, warehouse receipts act, sales act, divorce act, stock transfer act, and bills of lading act, and in 1910, the wife and family desertion act, and the act concerning wills executed outside the state of testator's residence.¹

¹ The bill concerning wills makes valid a will executed according to the legal formalities prevailing at the place of execution, although not executed in conformity with the law of the State where it is set up or relied on. This latter measure is in general conformity with the exist-

ing Maryland Statute, under which the Court of Appeals sustained as valid, even as to realty, wills executed abroad in conformity with foreign law. *Olivet v. Whitworth*, 82 Md. 258 (1896), and *Lindsay v. Wilson*, 103 Md. 252 (1906).

The conference or committee has in each instance entrusted the task of preparing the original draft of a bill to a specialist, thus at the outset, precluding the unskillful draftsmanship often found in legislative productions. After careful consideration in committee and by the whole conference at various sessions, each tentative draft has been printed and circulated for suggestion and criticism among lawyers, trade associations and men commercially prominent; and the final draft recommended by the conference has embodied the ultimate concensus of representative opinion, both lay and professional, throughout the country. The evolution of the bills of lading act will illustrate the methods thus pursued: In 1905, the committee on commercial law of the commissioners on uniform state laws employed Professor Samuel Williston, of the Harvard Law School, to prepare the draft of an act upon the subject of bills of lading. Professor Williston's first draft was submitted to the conference on uniform state legislation at St. Paul, Minn., in August, 1906, but discussion of it was deferred in order that it might first be laid before shippers, bankers and carriers. After detailed consideration by subsequent meetings of the committee or of the conference in Philadelphia, Portland, Seattle, New York City and Detroit, and the criticism by representatives of all parties in interest, the commissioners on uniform state laws finally approved and promulgated the proposed statute for adoption by the various states. The committee consisted of Francis B. James, of Ohio, chairman; Charles F. Libby, of Maine; Talcott H. Russell, of Connecticut; William O. Hart, of Louisiana; Charles Thaddeus Terry, of New York, and George Whitelock, of Maryland, and the late James Barr Ames, of Massachusetts, dean of the faculty of law of Harvard University. The act has since received the indorsement of the conference on bills of lading held in Chicago under the auspices of the American Bankers' Association; of the conference held at Washington under the auspices of the Civic Federation; of the National Industrial

Traffic League at its convention in Chicago, and on August 31, 1910, of the American Bar Association at its annual meeting in Chattanooga, Tenn.

The progress of the different commercial measures promulgated by the conference is indicated as follows: The uniform negotiable instruments act (1896) has been adopted by thirty-eight states and territories; the uniform warehouse receipts act (1906) has been adopted by nineteen states and territories; the uniform sales act (1906) has been adopted by seven states and territories, and the uniform stock transfer act (1909) has been adopted by three states.

The conference has avoided incorporating in the various acts any new or experimental theory. Its task has not been to create, but to ascertain, unify and declare existing law. In the event of difference between the laws of several states, the weight of authority has been expressed in the measure submitted.

A measure now pending is a bill on partnership. The movement to codify this branch of the law began in England in 1872, and Dean Ames was, at his death in January, 1910, the partnership expert in charge of the draft of an American act which has been under consideration for a number of years. The committee on commercial law of the conference have now placed this expert work in the hands of Dean William Draper Lewis, of the University of Pennsylvania, and an associate, and the measure was discussed in detail by the committee in February, 1911, in Philadelphia, such accomplished commentators as Floyd R. Mechem, of Chicago, and Francis M. Burdick, of New York, participating by invitation. Three views are at present prevailing as to a partnership act: 1. That the subject is not within the scope of uniform state legislation; 2. That partnership should in the proposed bill be created a legal entity like a corporation; and 3. That the contemplated law should adhere to the present doctrine that partnership is an aggregation of individuals.

The present paper does not purport to be a philosophical analysis of the new acts, nor to trace the evolution of their various provisions. Its purpose is briefly to indicate certain divergencies from the rules prevailing in Maryland, and to show that in most instances the new provisions are but embodiments of familiar principles, supplemented occasionally by reasonable rules of sound mercantile usage. The discussion is confined to four acts adopted by the Maryland legislature of 1910, viz.: The stock transfer act, the bills of lading act, the warehouse receipts act, and the sales act. Comment upon the negotiable instruments act adopted in Maryland in 1898 is, of course, unnecessary at this late date, but it may be observed that the last conference authorized its committee to employ Professor Williston to prepare a draft of proposed amendments to this law and to distribute the same for suggestion and criticism. Professor Williston was also the draftsman of the other four laws, Mr. Barry Mohun, of the Washington bar, collaborating with him in the warehouse receipts act. The writer was not concerned in the framing of the warehouse receipts act or the sales act, as they were promulgated before his appointment as a commissioner, but took part in framing the stock transfer act and the bills of lading act.

Passing now to specific treatment of the four laws of 1910, it may be said that an underlying principle of all of them is that the document of title is the sole representative of the property described, and that that document has the quality of negotiability. And again, it is to be observed that the definition of "value" in all of these acts is that of the negotiable instruments law, to-wit: Any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where the document is taken either in satisfaction thereof or as security therefor. This makes no change in the now generally accepted doctrine—the doctrine declared in Maryland in *Tiedeman v. Knox* (1880), although the state courts in New York, prior to the negotiable instru-

ments act, had entertained a different view, and the United States Supreme Court in 1842, had repudiated the New York doctrine in a New York case.

THE STOCK TRANSFER ACT.

(First Draft, 1907.)

The transfer of shares of corporate stock can now be accomplished only by endorsement and delivery of the certificates, or by its delivery with a separate written assignment or authority to sell. This is true, notwithstanding other or contrary provisions in the by-laws of the corporation, or in the certificate itself. The Maryland corporation laws, as revised in 1908, permitted a corporation not only to regulate the method of transferring its stock, but to decline to make the transfer unless previous assessments on the stock had been paid. This new statutory rule, therefore, works a radical change, though one which may be readily accepted.

The Maryland Court of Appeals long ago decided that assignment and delivery of a stock certificate would carry equitable title to the shares, as between assignor and assignee, although legal title thereto was not perfect in the transferee until after registry,² specifically declaring in another instance that until registry, the title was imperfect as against the corporation.³ But the new act also provides that until transfer on the books of the corporation, the voting and dividend rights of the new owner need not be recognized, nor is the former owner absolved from personal liability for calls and assessments. Thus the limitation prescribed by the Maryland courts and by the authorities generally⁴ is recognized and accorded its proper significance; but the statute leaves nothing to imagination, and the certificate is now made to represent the shares as nearly as possible. This is the primary object of the act.

² *Swift v. Smith*, 65 Md. 428 (1886); *Bloede Co. v. Bloede*, 84 Md. 129 (1896).

³ *Noble v. Turner*, 69 Md. 519 (1888).

⁴ *Cook on Corporations*, Sec. 373.

The equities between a transferee by endorsement on the certificate and a transferee by separate assignment are thus decided in favor of the former, provided he has taken title for value and without notice of prior assignment. In case of transfer by the latter mode, the title does not pass until the certificate is delivered; for if entitled thereto, the transferee by separate assignment may readily obtain it, or at his peril, permit it to be subsequently negotiated with an innocent party.

By dispensing with necessity for transfer on the books of the corporation to effectuate change of title, the new law abrogates the time-honored formality of appointing an attorney to make the transfer, and relieves the parties from the technical complications formerly attending death of a donor and consequent revocation of the power to transfer. So that the subsidiary provision that endorsement and delivery of the certificate shall be effectual, notwithstanding the death of the endorser, is logical and salutary.

Endorsement and delivery of the certificate are likewise declared to confer title, notwithstanding want of authority or legal capacity, and although induced by fraud, duress or mistake. In each case the transfer may be rescinded if the injured party proceeds with proper diligence, unless the certificate has passed to a purchaser for value, in good faith and without notice of the prior unauthorized or unlawful act.

Even though the unauthorized transfer has in fact been rescinded, if the transferee retains possession of the certificate and himself transfers it to a purchaser for value without notice, the latter takes indefeasible title.

Delivery for value without endorsement imposes, of course, an obligation to endorse which may be specifically enforced.

No lien upon the shares of a corporation can now exist in its favor, whether for a debt of the holder or otherwise, unless stated upon the certificate. And the reservation in a by-law, of a lien upon stock for a debt due the corporation

(as recognized in *Grafflin v. Woodside*⁵) would not be valid.

Of greater interest is the change in the law relative to attachment of, or levy in execution upon, shares of stock. Heretofore it has been possible to reach this form of property in either mode, without reference to the certificate, but it was registered on the books of the corporation.⁶ But the new law requires that the certificate itself must be physically seized before an attachment will lie. This is a distinct advance upon pre-existing law, and adds materially to the security of the *bona fide* transferee.

A similar provision is found in the bills of lading act and the warehouse receipts act. In each case, however, the alternative remedy for creditors hereinafter mentioned is provided.

Alteration of a stock certificate does not affect the title of the owner or transferee, as to the shares which it originally represented. And negotiation of the altered certificate is effective to the same extent, irrespective of the alteration. This provision is an obviously essential limitation to the finality of transfer by delivery; registration, as a requisite thereto, having been abolished.

The new law raises a series of warranties from the fact of negotiation, similar to those of the negotiable instruments act, and they require no particular comment. There are other useful regulations, all contributing to accomplish the general design of the law, viz.: To afford certificates of stock ownership their maximum efficiency as a commercial media.

THE BILLS OF LADING ACT.

(First Draft, 1906.)

The general principles of this act quadrate with previous Maryland authority. Its draftsmen considered a bill of lading, like a stock certificate, as a document of title, and have refrained from attempting to deal through it

⁵ 87 Md. 146, 1898.

⁶ Md. Code, Art. 23, Sec. 43, as

amended by the Acts of 1908, Ch.

240.

with the broader relation of shipper and carrier; except in so far as that relationship bears directly upon the document itself. The customary provisions of a bill of lading defining the carrier's liability have no technical bearing upon its character as a mercantile medium, but are modifications of the general law of carriers.

By the preponderance of American authority, expressed by the decisions of such courts as the Supreme Court of the United States and the Maryland Court of Appeals, a bill of lading was treated as not being negotiable in the same sense as bills of exchange and promissory notes. It was regarded in those courts as mere evidence of ownership of the property and the right to receive it at the place of delivery. By this view of the law a banker making advances of money on bills of lading did so at his own risk, and with notice that the agent of the carrier had no lawful right to issue the instrument so as to bind the carrier for goods not actually received.

The cases in the Maryland Court of Appeals aptly illustrate the principles established and the difficulty of changing them by the legislation of a single commonwealth. Thus the court held in *Baltimore & Ohio R. R. Co. vs. Wilkens*,⁷ that a *bona fide* purchaser of a certain railway bill of lading could not recover against the carrier, because the grain mentioned in it had never in fact been delivered to the company. Long before the adoption of the present uniform act the Maryland legislature sought to change the law by passing a statute (April, 1876), which made bills of lading negotiable in the same sense as bills of exchange and promissory notes, and declared them to be conclusive evidence of the delivery of the goods to the carrier. The statute was naturally limited to bills of lading executed in Maryland or which provided for the delivery of goods here. Later in *Lazard Freres v. Merchants' & Miners' Trans. Co.*,⁸ when this legislation was reviewed by the

⁷ 44 Md. 11, Feb. 1876.

⁸ 78 Md. 1 (1893).

The features of the act of principal importance to the mercantile community are the rights flowing from negotiability, and these are very explicitly stated.

Many of these rights have been heretofore declared and defined by the Maryland Court of Appeals, and it is gratifying to observe the general coincidence of the decisions involving the construction of the former statute, with the terms of the new law. But the latter is designed to minimize the necessity for judicial definition of rights, and proceeds with the particularity which characterizes the negotiable instruments act.

By the provisions of this statute if a bill of lading has been issued by a carrier, or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier is liable to the consignee in a non-negotiable bill, or to the holder of a negotiable bill who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods, or their failure to correspond with the description thereof in the bill at the time of its issue. It may be said broadly that the law "places an order bill of lading upon the precise basis of negotiability of a promissory note, check, draft or bill of exchange" or, in the words of Walter George Smith, of Pennsylvania, president of the conference of commissioners, in addressing the American Bar Association: "The salient feature of this act is that it makes these documents of title fully negotiable."

The law introduces certain personal warranties similar to those assumed by the maker or endorser of promissory notes, all operating as further assurances of title. Thus a party negotiating the bill warrants its genuineness, his right to transfer it, etc. But he is not liable as a guarantor for performance of the undertaking of the carrier or a previous endorser.

The provisions which vest the endorsee for value without notice with unimpeachable title, are but restatements of

the law which has prevailed in this state since the passage of the act of 1876.¹⁰

He acquires whatever title the consignor and consignee may have had, or had the power to convey.

These provisions obliterate the distinction between the common law theory, which regarded a bill of lading merely as a symbol of property,¹¹ and the modern mercantile theory that the bill is not only a symbol of property, but is also conclusive evidence of its ownership.

A banker who lends money upon the security of a bill of lading should obviously be assured of two things: First, that the goods are actually in possession of the carrier, and second, that they are the property of the borrower. The new law is designed to afford this assurance.

Thus a negotiable bill bearing the endorsement of the party specified as consignee, now passes by delivery, and may be further negotiated.

A non-negotiable bill cannot be negotiated at all, and the endorsement of such a bill gives the transferee no additional right.

The title of the person in possession of a negotiable bill may not be inquired into.

The person to whom the bill has been duly transferred, acquires title to the goods; although in the case of a non-negotiable bill it is necessary for him to notify the carrier, otherwise the property may be the subject of attachment or execution.

Another feature of the former statute (1902) is preserved in the provision that the insertion of the name of a person to be notified of the arrival of the property, shall not operate as a limitation upon negotiability, or as notice to the transferee or purchaser of any rights outstanding in such person. But in the *Jacob Dold Packing Co. v. Ober & Sons Co.*,¹² it had been held that the words "Notify G.

¹⁰ *Farmers' Packing Co. v. Brown*, 87 Md. 1 (1898); *Seal v. Zell*, 63 Md. 356 (1885).

¹¹ *Wilkins v. Ry. Co.*, 44 Md. 11.

¹² 71 Md. 155 (1889).

Ober & Sons Co." implied knowledge in the consignor of some interest in Ober.

Acceptance of the bill without objection at that time, renders the consignor amenable to all of its lawful terms and conditions.

Of only a little less interest are the provisions defining the obligations of the carrier, which are detailed with the same nicety, although confined to their bearing upon the bill of lading as a document of title.

In the case of a negotiable bill properly endorsed, the carrier is bound to deliver the goods to the holder; and in case of a straight bill, to the named consignee.

This obligation arises by necessary implication independently of the statute, and has been heretofore universally recognized.¹³

But the satisfaction of the carrier's lien for charges, the surrender of the bill and acknowledgement of the delivery of the receipt for the property thereby presented, as conditions precedent to delivery of the goods, are for the first time made the subject of specific legislation, although sanctioned by usage in the past.

The carrier is declared liable to a purchaser in the event of delivery of the property without cancellation of the bills of lading. This provision is quite similar to Section 1-c of the act of 1902, which was passed as a result of the transactions leading up to the important decisions of the Maryland Court of Appeals, reported in 102 Md. 573, 589 (1906). In one of those cases, *Chesa. S. S. Co. v. Merchants' Bank*, the carrier who delivered property to the endorsee of a bill of lading without having exacted its surrender, was held liable for negligence and answerable in damages to the bank which took it in further negotiation, the bills providing that they must be surrendered before delivery of the goods. The ruling depended upon the general law of torts. But in the other cases where the party who got the goods

¹³ *Lazard v. M. & M. Trans. Co.*, 78 Md. 1 (1893).

without surrendering the bill of lading, fraudulently altered it, the carrier was exonerated from liability to the bank.

The provisions of the bill of lading act and the stock transfer act, with respect to the vesting of title by negotiation, notwithstanding fraud, accident, mistake, duress and conversion, are quite similar and require no further discussion.

Goods in the possession of a carrier, for which a negotiable bill is outstanding, are no longer subject to attachment or execution; unless the bill is first surrendered to the carrier, or its negotiation enjoined.

Although no case on the subject is recalled, it is believed that prior to the passage of the act, the Maryland courts would, in view of the broad provisions of the attachment law, have decided in favor of the right of attachment, although it would doubtless have been defeated upon proof of the prior negotiation of the bill to a *bona fide* transferee. The new law, however, pronounces against the proceeding itself, and in lieu thereof provides a form of equitable process by way of injunction, apparently permitting a creditor to proceed thereby as though without remedy at law.

A manifest purpose will be perceived throughout the entire law to provide immunity for the holder in due course of a bill of lading. And this purpose is fortified by various provisions whereby punishment is provided for the wrongful issuance and negotiation.

It is provided that fraudulent issuance by the carrier, with knowledge that the goods have not been received, shall be a crime punishable by fine and imprisonment. This section is quite similar to Section 8 of Article 14 of our code.

Another provision, not heretofore in legislative contemplation, renders the fraudulent issuance of a bill containing any false statement punishable as a criminal act.

The provision forbidding under penalty the issuance of a duplicate bill with knowledge that the first is outstanding and uncanceled, might have been included within the purview of Section 10 of Article 14 of the code, although the term bills of lading is not used, and the only illustrative

case is that arising in course of a prosecution for unlawful delivery of goods described in a supposed receipt, where they were stored in the party's own warehouse,¹⁴ a civil case arising on distribution of funds to creditors of a person who issued a storage receipt for his own goods.

A penalty is imposed by the new law for taking and negotiating a bill of lading for goods to which the party has no title, or upon which there is a mortgage. And one who negotiates or transfers such a document knowing that the goods are not in the possession of the carrier, but without disclosing that fact, is likewise guilty of a criminal offense, as is also one who induces an officer of a carrier to believe that goods have been received, in order to secure the issuance of a bill of lading therefor.

The act contains other provisions of importance to effectuate its general intent, which might profitably be considered if space permitted.

THE WAREHOUSE RECEIPTS ACT.

(First Draft, 1905.)

It is apparent that the draftsmen of the law intended to invest warehouse receipts with the same stability as documents of title, as is manifested in the treatment of stock certificates and bills of lading. The fundamental resemblance which the latter bear to the receipts of warehousemen, explains the similarity in wording of the provisions of the two acts affecting them as purely negotiable instruments. The corresponding provisions of the former law (Article 14, Sections 1 and 2), applied to both instruments.

The preceding comment upon bills of lading is generally applicable and need not be repeated in reference to the negotiable character of warehouse receipts.

As already remarked, the bill of lading act avoids following out the contingencies which impose special rights or ex-

¹⁴ *State v. Bryant*, 63 Md. 71 (1884), or *Washington Bank v. Motter*, 97 Md. 545 (1903).

ceptional liabilities upon shipper and carrier, except in so far as those contingencies are directly associated with the conception of the instrument as a document of title. This course was pursued in order to avoid a general invasion of the broad field of the law of carriers which controls their relations with the shipper.

The same condition in a sense exists with respect to the law of warehouse receipts as related to the general law of bailments; but the committee on commercial law in preparing the warehouse receipts act deemed it desirable to dispose by provisions having no parallels in the bills of lading act, of several contingencies arising out of the special relation of bailor and warehouseman. The present discussion of warehouse receipts will be confined to these provisions.

The degree of care now exacted by warehousemen, in the absence of special contract, involves no departure from the rule at common law, and the accepted doctrine in this state. It is still that degree which a reasonably careful owner of goods would exercise under like circumstances.¹⁵

With the exception of fungible goods or those of such character that every unit is similar to every other unit (for example, grain), the warehouseman is required to segregate the property of his several bailors. He is permitted under certain circumstances to commingle fungible goods; but the measure of his responsibility is the same as though they had been separated.

He is unqualifiedly liable for the non-existence or misdescription of the goods mentioned in his receipt. This is consistent with the intent of the act to render the receipt conclusive evidence of ownership. But if the packages are labelled or marked when they come into his custody, he may avoid liability for misdescription by reproducing the markings in his own receipt.

He is protected from the risks attendant upon the storage of perishable or dangerous property, by a provision

¹⁵ *M. & M. Trans. Co. v. Story*, 50 Md. 4 (1878).

authorizing its sale after reasonable notice to the owner to pay his charges and remove the goods.

Neither of these three contingencies has heretofore been made the subject of statutory enactment in Maryland, nor has any reported case been found dealing with them specifically. The first and second are restatements of the law prevailing generally,¹⁶ while the third substantially follows the phraseology of the Massachusetts statute.

In a single sentence, the warehouse act disposes of a double inquiry which has many times engaged the attention of the courts, viz.: who is a "warehouseman?" and by whom may "warehouse receipts" be issued? It provides that warehousemen are persons "engaged in the business of storing goods," and that they alone may issue receipts.

It is believed that these provisions are but embodiments of the best judicial expressions on the subject. Certainly they preserve the sense of the decision of the Maryland Court of Appeals in the case of *State v. Bryant*, as they throw an interesting light upon a case recently argued in the Criminal Court of Baltimore, *State v. Gambrill*, wherein the state sought the conviction of a distiller for an alleged violation of the former warehouse act; namely, duplication of a receipt issued for whisky in his own warehouse. The rule just stated, as laid down in many decisions, was invoked by the traverser to show that a warehouse receipt as contemplated by the former statute could not be issued by a distiller, because his business was not that of storing property; but no ruling was obtained on this point, and the case turned upon the repeal *vel non* of the former provision of the criminal code by supposedly inconsistent provisions of the new act. The prior rule in Maryland was evidently that now laid down, although a certain federal court reached a different conclusion in a civil case involving somewhat the same elements,¹⁷ which has since been reversed on appeal.¹⁸

¹⁶ A. & E. Enc., Vol. 30, pp. 44 and 57.

¹⁷ *In re Miller*, 176 Fed. 606.

¹⁸ *Taney, Trustee, v. Penn National Bank*, U. S. C. C. A., 3d Circuit, March Term, 1910, No. 36.

Considerable care is evidenced in prescribing the essential terms of warehouse receipts. Only two of these provisions, however, present novel features, namely:

a. A warehouseman, if owner of the goods for which he gives a receipt, must state that fact.

b. He must also, in order to reserve a lien, state in the receipt that advances have been made and liabilities incurred if such is the case, although he need not set forth the precise amounts.

His lien may be lost either by a surrender of the goods without exacting payment of his charges, or by dishonoring his obligation to deliver in response to a lawful demand.

The two statements at first glance appear in conflict; but are doubtless intended to safeguard bailors from the assertion of arbitrary demands by warehousemen.

Both the carrier and warehouseman have the right, in all cases in which adverse claims are exhibited to the goods in their possession, to require the claimants to interplead. Probably they might formerly have done so under our general equity practice,¹⁹ but it is quite satisfactory that the right is now definitely conferred.

When a warehouseman's receipt is lost, his recourse is to ascertain by an equity proceeding the rights of the parties; for the issuance of a duplicate is forbidden under penalty. And even though the delivery be made in conformity with the court's order, the warehouseman appears to be still liable in the event that the original receipt is found, and his only safeguard lies in the exaction of a bond securing him against such contingent liability.

The alteration of a receipt, if immaterial or authorized by the warehouseman, or made without fraudulent intent, does not excuse him from liability; and in such cases he is accountable according to the terms of the receipt as originally made.

Neither is he absolved in the case of a material or fraudu-

¹⁹ *Owings v. Rhodes*, 65 Md. 408.

lent alteration from liability according to the original terms of the receipt. And the rights of the purchaser are correspondingly limited, and are those existing according to the form of receipt at the time he acquired it.

This is a distinct departure from the ruling of the Maryland Court of Appeals in the case of *Merchants' Bank v. Chesapeake Steamboat Co.*,²⁰ wherein it was held that the alteration of a bill of lading would render it void, even in the hands of a bona fide holder. It should be remarked, however, that the bill before the court in that case contained a provision to that effect, although the reasoning of the opinion tends strongly to uphold the court's conclusion quite independent of such provision.

THE SALE OF GOODS ACT.

(First Draft, 1903.)

Long familiarity with the doctrines of the common law as interpreted by the Maryland courts, may have inspired doubt as to the adequacy of any collection of statutory rules governing sales of personal property.

To those, however, who are familiar with the English sale of goods act, 56-7 Vict., Ch. 71, it will have become apparent that such a codification has been in fact very successfully accomplished.

Many of the provisions of the law which is the topic of the present discussion have been borrowed from the English act; but its draftsmen have not been unmindful of distinctions proper to be drawn, nor the possibility of improvement, and a comparison of our uniform sales act with the English law, while disclosing many points of similarity, will also reveal important differences. Greater familiarity with the new law is convincing that its codifiers have as far as possible preserved settled principles, and followed established precedent.

The fundamental distinction between a present sale and

²⁰ 102 Md. 573 (1906).

a contract to sell in the future is specially recognized. The former is defined as an agreement which transfers the property, and the latter as a contract whereby the seller agrees to make the transfer. The phrase "contract of sale" is discarded.

Infants and persons laboring under mental incapacity are required to pay a reasonable price for necessities. This provision may be fairly distinguished from the rule hitherto prevailing in Maryland. In the case of *Monumental Building Assn. v. Herman*,²¹ an infant was declared absolutely bound by his contract for necessities. The new law seems to modify this liability to the extent of exacting payment of a reasonable price for the subject-matter of the contract, rather than the contract price.

There is no attempted consideration or classification of the rules regulating the capacity of an infant or incompetent, to contract generally or to transfer property; but all such questions are left to the general law.

"The limit of value in cases falling within the seventeenth section of the Statute of Frauds was raised by the commissioners to \$500; the exceptions, viz.: acceptance and the giving something, either as earnest or in part payment, standing as before." But the general assembly of Maryland reduced the amount to \$50. Ohio has raised it to \$2,500, and Connecticut has made it \$100.

The seventeenth section, thus substantially re-enacted, applies as well to contracts for future as to those for immediate delivery; and whether the goods sold are already made or still incomplete. These provisions do not work a material change in Maryland law.²²

A contract for the sale of specific goods will be avoided,

²¹ 33 Md. 128 (1870).

²² Except perhaps in the doctrine of *Rentch v. Long*, 27 Md. 188 (1867), and allied cases, *Leonard v. Medford*, 85 Md. 666 (1897) and *Bagby v. Walker*, 78 Md. 239 (1893). In the first of these it was held that a contract for the sale of stand-

ing grain was not within the statute. By the provisions of the new act goods to be specially manufactured only are exempted from its terms. Uncut grain or trees could hardly be included in that category, and the cases in question may therefore be superseded.

if, before the risk passes to the buyer the goods wholly perish without fault of either party. But an option is reserved, whereby in the event of partial destruction only, without material deterioration of the whole, the buyer may treat the contract either as void, or as binding upon the seller as to the undamaged property. In the latter case he must pay the contract price.

Although it was the purpose of the committee to express, by this provision, existing law, it may involve divergence from the doctrine of previous Maryland cases. In general terms the rule here has been that if the contract was possible in itself when made, the fact that it subsequently became impossible from causes beyond control, will not excuse non-performance.²³

While these cases are not in opposition to the exceptions generally recognized, that performance is excluded when some specific instrumentality essential thereto is destroyed,²⁴ it may still be wise to insert in contracts for future performance, a clause protecting the promisor against causes of breach beyond his control.

Fixing the price is subject to the familiar rules. It may be determined either by the contract, in such manner as the parties designate, or by their course of dealing. When no standard is fixed, a reasonable price is payable. It is to be noticed, however, that in cases in which real estate forms a part of the consideration, the act will not apply.

Non-performance of a condition leaves the other party free to treat the contract as avoided; to waive the breach, or, in certain events, to regard it as a breach of warranty. These rules are well understood and may be passed over.

An express warranty is defined as an affirmation of fact, or a promise by the seller, whereby the buyer is induced to purchase the goods, and does so purchase relying upon

²³ *Southern Building Association v. Price*, 85 Md. 163 (1897); *Brantly on Contracts*, page 261; *Kribs v. Jones*, 44 Md. 396 (1876); *Benson*

v. Atwood, 13 Md. 20 (1859); *Willske v. Steiner Mantel Co.*, 103 Md. 235 (1906).

²⁴ *Mechem on Sales*, Sec. 1101.

the seller's statements. The Maryland Court of Appeals has frequently considered the subject.²⁵

An implied warranty of the seller's title is now specifically declared; and although its existence in Maryland seems never to have been doubted, there has been considerable conflict of opinion elsewhere, particularly as to goods not in the seller's possession. But of late the old rule that the buyer must beware has been generally mitigated. The cases are in harmony with the new law, in the doctrine that a sale of personal property carries an implied warranty of the seller's title,²⁶ except in instances of sales by auctioneers, sheriffs, etc., and in other cases where the title of third parties is obviously involved.

There are a number of provisions relating to implied warranties of quality, and they also generally conform to Maryland doctrine. Thus a sale by description involves a warranty that the goods shall correspond therewith.²⁷

In the event of sale by sample a guaranty is implied that the bulk shall correspond. This rule was recognized in *Gunther v. Atwell*.²⁸ Also the buyer shall be afforded a reasonable opportunity of comparison,²⁹ and in the event that the seller is a dealer, he warrants the goods sold to be free from defects not apparent upon examination of the sample, or which would render the property unmerchantable.

The new law also recognizes no implied warranty arising as to the quality or fitness of the article for the purposes intended by the buyer, unless they are made known to the seller, and the buyer relies upon his skill in their adaptation.³⁰

The question as to the time when property in the goods

²⁵ *Osgood v. Lewis*, 2 H. & G. 495 (1829); *Crenshaw v. Slye*, 52 Md. 140 (1879); *Potomac Co. v. Harlan Co.*, 66 Md. 42 (1886).

²⁶ *Rockwell v. Young*, 60 Md. 563 (1883); *Seemueller v. Fuchs*, 64 Md. 217 (1885).

²⁷ *Rasin v. Conley*, 58 Md. 59

(1882); *Columbian Iron Works v. Douglas*, 84 Md. 44 (1896).

²⁸ 19 Md. 157 (1862).

²⁹ *Columbian Iron Works v. Douglas*, 84 Md. 44.

³⁰ *Queen City Glass Co. v. Pittsburgh Clay Pot Co.*, 97 Md. 429 (1903).

passes between the parties is still largely a question of intent, and the rules prescribed by the new law for ascertainment of the intent are of interest.

In an unconditional contract for the sale of specific goods ready for delivery, the property passes when the contract is made, notwithstanding postponement of both payment and delivery,³¹ although the seller's lien for the purchase price is in certain instances reserved.

A delivery "on sale or return" now vests the title, but confers an option upon the buyer to revest it in the seller by returning the goods within the time agreed upon or within a reasonable time. In *Spickler v. Marsh*,³² the buyer failed to return the article, it was held that the seller could treat the sale as absolute. And a sale "on trial" is consummated and property passes when the buyer signifies his approval by words or acts, or retains the goods without notifying the seller of their rejection within a reasonable time. This is in consonance with *Dalamater v. Chappell*.³³

When the contract contemplates a sale by description merely of unascertained or future goods, property passes when goods of that description in a deliverable state are "unconditionally appropriated" to the buyer with his assent.³⁴ This regulation doubtless has principal reference to the matter of shipment; and it is followed by the provision that when the property is delivered either to the buyer or to a carrier or bailee for delivery, it is presumed to have been unconditionally appropriated even though the buyer is to pay the price before actual delivery, or the goods are marked C. O. D., or words to that effect.³⁵

A reservation of the right of property after shipment is affected by so wording the bill of lading that it may run to the seller or his agent, or by retention of the bill.

³¹ This is in general the doctrine of *Foley & Woodside v. Mason*, 6 Md. 37 (1854); *Cheney v. Transportation Co.*, 59 Md. 557 (1883); and *Farmers Phosphate Co. v. Gill*, 69 Md. 537 (1888).

³² 36 Md. 223 (1872).

³³ 48 Md. 244 (1878).

³⁴ See *Hopkins v. Cowen*, 90 Md. 162 (1899).

³⁵ *Farmers Phosphate Co. v. Gill*, 69 Md. 545 (1888).

The form of the bill otherwise will not operate as a reservation of property except for the purpose of securing performance of the buyer's obligations. The exception seems to correspond with the seller's lien as recognized in *Cheney v. Eastern Trans. Co.*³⁰

Where goods are shipped by bill of lading, with bill of exchange or acceptance attached, the buyer must honor the latter or return the bill of lading, for he gains nothing by its possession unless title to the goods has passed to a bona fide holder of the bill of lading in pursuance of regular endorsement. The exception is in recognition of the effect of negotiation of a bill as defined by the bills of lading act.

The provisions relating to reservation of property in the goods are thrown into relief by the subsequent sections which treat of the risk of loss pending the transfer of actual possession. These provide that if the property in the goods has been retained by the seller merely to secure performance of the buyer's obligation, the goods are at the buyer's risk from the time of delivery, either to the buyer himself or to a bailee for his account. This should be of considerable interest from the underwriting standpoint.

Several sections of the act are devoted to the question of formal transfer of title; and these are so worded as to blend harmoniously with the provisions of the warehouse act and the bills of lading act. They require no separate discussion.

We now refer briefly to the provisions of the law defining the rights and remedies of the seller; his lien for the purchase price, and remedies of stoppage in transitu and resale.

The explicit definition of the term "unpaid seller" is of interest, particularly its sub-division relating to the effect of payment by an obligation subsequently dishonored. It provides that the seller is still unpaid, notwithstanding he

³⁰ 59 Md. 557 (1883).

ing the carrier, a consistent exception exists when a negotiable document of title is outstanding. That is to say, the carrier is not obliged to heed the notice unless the bill of lading is first surrendered for cancellation. In this way the law disposes of what would otherwise be irreconcilable conflict between the seller and a party to whom the bill of lading has been negotiated.

The seller may re-sell without incurring liability to the buyer, if the goods are perishable; if the right has been reserved in case of default; or if payment has been delayed an unreasonable time (provided he retains his lien or has stopped the goods in transit). And he may also proceed for the recovery of damages from the buyer for loss occasioned by the latter's original breach of the selling contract.

Some of the interesting questions incident to the right of re-sale have been discussed by the Maryland Court of Appeals in the recent case of *Regester v. Regester*.⁴¹

The validity of the re-sale will not be affected by failure to notify the buyer thereof, except in the re-sale of perishable goods. However, the omission of such notice may be relevant in a subsequent issue as to the buyer's initial default.

The last provision attempts the settlement of a much discussed and disputed question. It is doubtless more fair to require the notice in all cases; but the purchaser at the re-sale must have full protection, and it would be manifestly unjust to the buyer to shut out all inquiry as to reasonableness of the sale. The new rule seems to effect a sensible compromise, by validating the sale, but leaving the right of subsequent inquiry available to the buyer in a personal action against the seller.

The seller's right to rescind the contract upon default in payment of the purchase price was recently considered in the case of *Baltimore City v. Schaub Bros.*, 96 Md. 534 (1903). In that case, however, the breach proceeded from

⁴¹ 104 Md. 1 (1906).

the $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2^2 = \int_0^\infty e^T e \, dt = \int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \quad (1)$$

where Q and R are symmetric positive definite matrices.

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ can be expressed as

$$\|e\|_2^2 = \text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right) \quad (2)$$

where trace is the trace of a matrix. The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (3)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (4)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (5)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (6)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (7)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (8)$$

The $\mathcal{H}_2$ norm of the error signal $\|e\|_2$ is given by

$$\|e\|_2 = \sqrt{\text{trace} \left(\int_0^\infty \begin{bmatrix} x^T & u^T \end{bmatrix} \begin{bmatrix} Q & 0 \\ 0 & R \end{bmatrix} \begin{bmatrix} x \\ u \end{bmatrix} dt \right)} \quad (9)$$

In the case last referred to, *Equitable Co. vs. Baltimore Coal Tar Co.*, no market was available, and the court therefore permitted the seller to recover the contract price, less the cost of the raw product and the expenses incurred in its manufacture. This nearly corresponds with the new rule with respect to the measure of damages in contracts for the sale of goods the manufacture of which is incomplete. The seller of such goods is enabled to recover reimbursement for expenses necessarily incurred by him in preparing the subject matter of the contract for fulfillment of its terms; but a countermand or repudiation from the buyer limits his recovery in this behalf, to the amount already expended at the time of the notice. The provision apparently contemplate unfinished (and therefore unsalable) goods, and the seller is accordingly permitted to recover the profit which he would have made if the contract had been fully performed.

We pass now to consideration of the important subject of breach of warranty of quality; and though the provisions are expressed with great precision, the law heretofore recognized in Maryland seems to have undergone no material change except in one particular.

The right is now accorded the buyer to rescind the contract absolutely even after delivery in the event of breach of warranty. This right was expressly denied in the case of *Horn v. Buck*.⁴³

It cannot, of course, be availed of in the event the buyer knew of the breach of warranty when he accepted the goods. In rescinding the sale, the buyer is required to notify the seller of his election to rescind within a reasonable time, and to return the goods undeteriorated, unless the deterioration is caused by the breach of warranty. And his action operates in discharge of his contract obligation.

The buyer's customary options to accept the goods and set up a breach of warranty by way of recoupment, main-

⁴³ 48 Md. 370 (1878).

tain an action for damages, or refuse to accept the goods, if there has been no delivery, and maintain an action for breach of the warranty, exist as heretofore.⁴⁴

A provision operating in favor of the buyer, and quite similar to that already referred to for the benefits of the seller, permits the former (after an offer to return the goods in pursuance of his right to rescind), to hold the property as bailee for the seller, with a lien for the return of the purchase price in whole or in part.

The writer has now referred, in a cursory way, to the leading provisions of the four uniform commercial acts. The codification has been opposed upon the ground that it tends to limit the expansion of the law; but at the close of each of the acts appears a provision to the effect that in cases not falling within its express provisions, the rules of law generally, and the custom of merchants shall apply as heretofore.

In each act also appears a series of definitions of the various terms employed for the purpose of narrowing their meaning to the contemplated shade.

It is to be earnestly hoped that the effect of this legislation will be that contemplated by its leading rule of interpretation, which is to effectuate a purpose to make uniform the laws of the states which enact it.

BALTIMORE, MD.

GEORGE WHITELOCK.

⁴⁴ Warren Glass Works v. Keystone Coal Co., 65 Md. 547 (1886).

DELAYS AND REVERSALS ON TECHNICAL GROUNDS IN CIVIL AND CRIMINAL TRIALS.

The commonly accepted theory of writers and speakers on public affairs is that when evils become very great they provoke such a revulsion among the people that a reform is inevitably produced, but Herbert Spencer said that when evils become deep or widespread and are generally recognized, they become incurable. The most popular and most universally accepted theory in this country, especially among persons of an optimistic temperament, is that we are always becoming better—that we are always rising to a higher plane and always making progress; but Walter Baghot clearly proved that the progressive status is the unusual status; that the stationary condition is the normal condition of nations. A German poet said:

"Die Welt, die bleibt wie immer
Nur die Menschen werden schlimmer."

However we may regard these conflicting theories, it is clear beyond doubt that no country can make any great advance, and no deep-rooted evil can be remedied, without the creation of a clear, vigorous and firm public opinion in favor of reform.

We have made wonderful improvements in discoveries and inventions to save time, labor, cost and waste and to lessen distances; but in the courts we still move as slowly as the travelers that in olden times crept along in ox-carts and canal-boats. We have made wonderful improvements in science, medicine and surgery; but we have made few improvements in the science of government or in the administration of justice. In all the departments of human activity, except the last two mentioned, men will readily accept teaching and advice from their superiors in ability, skill and learning and will readily yield to proper leadership; but in governmental affairs and in the administration

the court, without delay and without a second trial except in rare and extreme cases, to decide the dispute solely according to the fundamental principles of the substantive law. To bring about such a condition radical changes are necessary (1) in our constitutions; (2) in our codes and statutes, and (3) in the mental and moral attitude of the lawyers at the bar and on the bench. Reforms in the constitutions and in the codes and statutes will become efficient only after long delay and strenuous effort unless the judges who are to interpret them can be radically changed in the habits and opinions of a lifetime. Therefore it is not only necessary to make the need of reform clear, but the need of it must be incessantly dinned into the ears of the lawyers and the people until public opinion becomes so distinct and strong that dull, conceited or stubbornly conservative lawyers can not resist it.

Vain or antediluvian judges of some states indulge in hair-splitting decisions either because they hope to appear as ultra learned, shrewd or logical or because they are really indifferent to the duty of deciding a case according to its merits as determined by the substantive law. Sometimes they are eager to give a decision for the party fairly entitled to win, but with the erroneous belief that they have not the power to do it on the record, they hunt zealously for some petty technical reasons, based on the adjective law appearing in the record, to justify a reversal and thus they increase the chance that another meritorious party will fall into a pit-fall in a later case.

Sometimes a judge resorts to such a hair-splitting decision in a criminal case because he does not himself approve the law to be enforced or because his sympathies (acquired when he was himself defending criminals at the bar), are really with the men who have violated the law. There is no chance for a quick and clear condemnation of such an opinion. An adverse criticism in some distant law journal or in a text-book published years thereafter or in the opinion of some distant court has little effect. The lawyers di-

justly accused, we have probably allowed Judge Lynch, who is unknown in Europe, to murder more innocent men in the past ten years than the courts have unjustly condemned in a hundred years. The result is that blood—guiltiness has outrageously and alarmingly increased in late years and far beyond anything known at the present time in any other civilized land. We do not want to have any innocent man convicted; and if every case is solely decided on the merits by trial courts and appellate courts and if our governors wisely exercise their pardoning power, the possibility of the conviction and punishment of an innocent man is most remote; but the bare possibility of such a calamity should not lead us into the folly of making it almost impossible to convict the guilty.

In fact, thoughtful men have come to the conclusion that the criminal law, by reason of our absurd procedure, has broken down in this country. It is true that we convict and punish many humble offenders and, in rare instances, an influential offender; that our jails and penitentiaries are full of ignorant, lowly, evil-minded or hardened criminals; but we rarely convict a murderer or a financial pirate who has influential friends and money enough to hire shrewd, competent lawyers. In some of our states we have annually more murders than in all Europe; and, although sixty to eighty per cent of the murderers there are convicted and punished, we convict and punish less than two per cent. When we compare the course of the first Thaw trial which lasted three months in New York with the Crippen trial which lasted less than five days in London, we see, if we have sufficient intelligence, how far behind we are.

The delays in civil and criminal trials here are inexcusable and yet it would not be hard to avoid most of them: These delays are due to the complicated, obsolete nature of our procedure, to the deep-rooted, unreasonable conservatism of our courts and to the dilatory habits of the lawyers themselves. Delay usually suits the purpose of the defendant; the plaintiff proceeds slowly because he must

of the cases tried in the jury courts; now such cases have run up to eighty or ninety per cent. In these damage suits the lawyers usually get from one-third to one-half of the sum recovered. In ninety criminal cases out of a hundred the defendant is guilty. In these two classes of cases especially, perjury and the suppression of testimony and the systematic dispersion of important witnesses, occur oftener than any of us want to believe. The delays and expenses of civil suits and the reversal of about forty per cent of all the cases appealed, the reversal being, in more than half the cases, on questions that in no way touch the real merits of the matter in dispute, have brought discredit upon the law and the legal profession and have made wise litigants shy of the courts. It is astonishing how easily, in a discussion of the reform of criminal trials and in actual trials, the victim of the crime is overlooked. The defenders of old abuses are eager to give a helping hand to the criminal; but few of them feel the need of giving a helping hand or indemnity to his innocent victim. At a trial the latter even becomes, in most cases, the real scapegoat and is badgered and denounced as if he was the real and justly-hated culprit. If the victim has been killed, innumerable lies are told on him when he can not answer. His widow and children weep in vain. Their ears are deafened by the approving shouts of the ignorant and maudlin crowd at the acquittal of the man that wrought their ruin. To many dull, maudlin or semi-criminal persons there is a halo of heroism about a triumphant criminal, especially if he is a murderer, no matter on what ground he is acquitted; and yet it sometimes happen that a man easily acquitted in a criminal case is held liable in damages for his crime by another jury in an unsensational suit by the persons wronged.

The first step toward such reforms as will prevent unnecessary delays in trials and needless reversals by appellate courts for mere errors in procedure is to convince the leading lawyers and judges of the country that such changes will not prevent the attainment of substantial jus-

judges of a state are in that condition of mind, it is not surprising that codes and statutes intended to eliminate useless "technicalities of practice and procedure" should be nullified by foolish interpretations or be stubbornly ignored. Professor John H. Wigmore, in his just but scathing criticism of the narrow and inexcusable opinion of the Supreme Court of California when it reversed the conviction of Mayor Schmitt truly said:

"All the rules in the world will not get us substantial justice, if the judges have not the correct, living, moral attitude toward substantial justice. . . . We do not doubt that there are hundreds of lawyers whose professional habit of mind would make them decide just that way, if they were elevated to the bench to-morrow in place of those other anachronistic jurists who are now there. The moral is that our profession must be educated out of such vicious habits of thought."

When the Supreme Court of Missouri in the *State v. Campbell*, 210 Mo. 202, reversed Campbell's conviction for rape because the indefinite article "the" was omitted from the indictment, it would have been well if the foremost lawyers of the state could have expressed their condemnation in clear terms for the honor of the state and the profession. Such a folly, which has been so universally condemned, would not have been soon repeated.

Justice delayed is often justice denied. In *Magna Carta* the promise was *nulli differemus . . . justitiam*. To one aggrieved the remedy is as important as the right. Of what value to us is the richest fruit beyond our reach or the clearest right that we can not enforce? Unavoidable uncertainties in substantive law we can endure; we can bear defeat on the merits; but it is outrageous that we should lose a clear right because of some slip by a lawyer in trying to avoid the innumerable pitfalls of an antiquated system of procedure that grew up in England when it was only half civilized and when the people needed protection from barbarous laws or from unjust prosecution at the whim of an arbitrary king or his ministers. Delays increase the costs greatly, cause the loss of important witnesses and often

In a jury trial innumerable questions arise as to the competency of evidence and as to the court's instructions to the jury and yet juries, in fact, wisely pay scant attention to the nice points that arise in such a way; but, whatever the verdict—however just it may appear to be from the whole record—the appellate court often scans these small points of procedure with a microscope and, in about forty per cent of the cases, finds a flaw somewhere; and once more the parties, after a delay ranging from six months to two or three years, must fight the whole battle over again, though every judge on the appellate bench might admit that the winning party ought to have won and should win again. But even if the appealing party is right, he must make his motion for a new trial at the right time and on the right grounds and must get his long bill of exceptions in perfect order before the court and must take the appeal at the right time and in the right way, and must have the entire record copied at great expense, though nine-tenths of it may have nothing whatever to do with the only question that will be considered by the appellate court. If his lawyers make a slip anywhere, he will lose his right, though the appellate judges may express deep regret that they are unable to allow so just a claim or defense.

To show how far the mere machinery of the courts is raised to absurd importance, it is only necessary to say that while the American and English Encyclopaedia of Law—covering the entire field of substantive law defining our rights—contained thirty-two volumes of about 1,400 pages each, the Encyclopaedia of Pleading and Practice published by the same corporation and intended to treat only of our remedies—of the mere machinery of the law—covered twenty-three volumes of 1,100 pages each. We also have an Encyclopaedia of Evidence in fourteen volumes of 1,000 pages each. Think how absurd it is that the equity procedure of our federal court today is based upon England's technical procedure of seventy years ago and that the Supreme Court of the United States has told us in Thomp-

son v. Wooster, 114 U. S. 104, that the best exponent of that practice is Daniel's Chancery Practice issued in 1837, for which an English lawyer now has no more use than he has for the code of the Visigoths.

Many cases are tried twice, some three times and some even oftener, not because it is uncertain who ought to win under the substantive law, not because the merits of the controversy are in doubt; but because the winning lawyer and the trial judge, in the opinion of the appellate court, made some mistake in pleading, in evidence, in instructions to the jury or in some other matter of procedure; and yet in every state using a code of practice, it is provided, in substance, that "a judgment shall not be reversed or modified, except for an error to the prejudice of the *substantial rights* of the party complaining thereof." That the English trial courts try cases faster than our courts and that the English appellate courts reverse fewer cases and grant new trials far less often than our courts has been shown so often by the statistics and is now so well known among well-informed men that I need not dwell upon the subject. In England at least, a new trial or reversal is not granted for any technical error in procedure—is not granted if the party that won was entitled to win on the merits; but, as said by Mr. Roscoe Pound, our appellate courts do not try the case; they only try the record; they only decide whether all the outworn subordinate rules of the game were observed. The court of appeals in England, acting for thirty-two millions of people, grants only about twelve new trials a year. From September 24, 1909, to March 10, 1910—not six months—there were thirty-eight cases appealed in Kentucky by defendants convicted of crime. Of these thirty-eight cases seventeen were reversed and twenty-one were affirmed; and of the thirty-eight cases sixteen were for homicide. Of these sixteen homicide cases six were reversed and ten were affirmed and in only one of the ten was death the penalty. Some of these cases were tried twice and one was tried three times. The

same story may be duplicated in almost any state of the Union. Is it any wonder that England, Ireland and Scotland, with almost twenty times the population of Kentucky, have fewer murders?

Section 340 of the criminal code of Kentucky provides:

"A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the *substantial rights* of the defendant have been prejudiced thereby."

Under such a statute, here and in other states, the appellate courts generally excuse their technical reversals by falling back upon the doctrine of "presumed prejudice from every error." In other words, if there is a flaw in the indictment, in admitting or excluding evidence, in the court's instructions or in the procedure generally, the case must be reversed, if the accused is convicted; but never, of course, if he is acquitted. If he appeals, the burden is on the state to show "beyond a reasonable doubt" that the error could not have hurt him, no matter how clear the proof of his guilt is. Not so in any other civilized land. It is said that every man accused of crime has a constitutional right to be tried by a jury; that the jury alone can pass upon his guilt; that the court has no right to say, when a technical error has been committed, that the jury would have convicted him if the error had not been committed. Nobody can be convicted unless a jury has rendered a verdict against him; nobody wants him to be convicted without such a verdict; but it is reasonable and fair to say that if a jury has convicted him and if the appellate court, after reading all the evidence, is convinced beyond doubt that he is guilty, his "substantial rights" could not have been prejudiced by a technical error in the pleading, the evidence or the instructions. At any rate he should be compelled to show that the error probably did prejudice his "substantial rights." When he thus appears guilty by the verdict of a jury and is guilty in the opinion of the appellate court, he ought not to be given a new trial, unless evidence of a vital character has

been improperly admitted or excluded or unless the court has plainly and clearly given a misleading instruction. No quibbling over words or phrases, no mere fault-finding or strained constructions should be allowed. Wherever the constitution of the state will not allow a verdict of a jury to be affirmed, merely because some error of procedure has been committed, although the appellate court believes the accused guilty beyond doubt, the constitution should be changed. In some states such a change of the constitution would not be necessary, if the judges were in sympathy with the right view of the matter.

I have not time to point out all the remedies that should be applied to lessen delays and to prevent technical reversals in civil and criminal trials. No petty tinkering, here and there, with existing law will suffice. Our codes and statutes as to procedure should not be minute. They should give the courts more latitude in making flexible rules and in exercising a reasonable discretion. The changes must be radical as they were in England and in Germany; but some changes that would be beneficial in criminal trials and that would tend to prevent delays and technical reversals may be hurriedly mentioned, as follows:

(1) It should be possible to prosecute a criminal (a) by indictment and, in misdemeanors at least (b) by information on the part of the public prosecutor with the concurrence of some magistrate or judge.

(2) An indictment should be short and simple. It should briefly state the nature of the crime and only such facts as are necessary (a) to enable the accused to know what the offense is and where and when it was committed and (b) to enable the court to enter such a judgment as will prevent a second prosecution for the same offense. All of that could be stated in any case in five or ten lines.

(3) The prosecutor should have the right to amend the indictment at any time, provided the whole character of the crime is not changed and the accused is given the right

to a continuance, when necessary, to get new proof for his defense.

(4) The rules of procedure should be held to be directory, not mandatory. In the appellate court, the accused should be allowed to complain only of an abuse of the trial court's discretion in passing upon such questions. Even if the trial court erred in preventing him from producing proper evidence or in admitting incompetent evidence or in giving an erroneous instruction, a new trial should not be ordered, unless the court has a reasonable doubt of his guilt or unless the trial court abused its discretion.

(5) The press should be allowed to publish only a report of what actually occurs in court. It should not be allowed to exploit, in a sensational way, the anticipated evidence in cases to be tried or to publish exaggerated or biased accounts or to express opinions of a case actually on trial.

(6) Jurors should not become disqualified because they have read of the crime in the newspapers or heard rumors about it or formed hasty opinions on such newspaper reports or rumors, if they can still, in the opinion of the judge, give the accused a fair and impartial hearing. The present method of allowing lawyers to spend days and weeks and months in the interrogation of jurors should be forbidden. It is an abuse that makes a fair trial almost impossible, that eliminates the most competent jurors and that brings the courts and the law into contempt. At common law, in olden times, juries were selected from the neighborhood because they were presumed to know some of the facts at least.

(7) Expert testimony should be carefully regulated; hired partisan experts should be carefully tested and scrutinized by the court; their number should be limited; and their fees regulated. They should not be allowed to have big fees or contingent fees to warp their sworn opinions.

(8) Nine or ten jurors should be allowed to render a verdict. Unanimity is obtained only by a compromise of

conscience in most cases. One or two corrupt or stubborn or ignorant jurors should not be allowed to prevent a verdict. The appellate court can protect the innocent. A majority verdict was allowed by the ancient law of Rome and is allowed now by the modern law of Germany.

(9) The accused should be allowed to remain silent, but his silence ought to be a fair subject for comment. The state should have the right, in an orderly way, to compel him or any one else to produce any paper or thing that may be important in the trial.

(10) Perjury should be more promptly prosecuted and punished. It is a growing evil and an awful hindrance to justice.

(11) Jury service should be exacted of our best citizens; but the jurors should be treated with more consideration.

(12) The state should have the same number of peremptory challenges as the accused and the number should be smaller. Either party should have a right to a change of venue when a fair trial can not be obtained in the county where the accused was first charged with the offense.

(13) A transcript of the evidence of a dead, insane or unavoidably absent witness of a former trial should be competent evidence in a second trial.

When a lawyer is retained to defend an accused man his first effort is to get delay. He wants time that public sentiment against the criminal may die out; that prosecuting witnesses may be weakened or become uncertain as to the details of their testimony; that some may die and others move away; that public sympathy or pity or a plausible theory may be worked up for the defense. When a trial is reached, every possible effort is made to get some technical error into the record on which a reversal in the appellate court may be asked and further delay secured. As time passes, the probability of conviction and the degree of punishment become less and less. As final punishment thus becomes uncertain and as it follows long after the of-

fense, there is no deterring effect upon other persons of criminal instincts. The most popular criminal in America seems to be a murderer. It is said that in the United States in 1896, for each million of the population, there were 118 homicides; in Italy less than 15; in Canada less than 13; in Great Britain less than 9; in Germany less than 5.

Petty offenses in Great Britain are promptly disposed of in the small courts. When the higher judges, in their circuit, come to any town where there is not a single criminal case to be tried, the township officers, with impressive formality, present the judges with a pair of white kid gloves. This ceremony is quite often carried out, even in towns of considerable size. Before we can reach that condition here, radical reforms must be made in our legal procedure, in public opinion and in our religious and moral standards.

LOUISVILLE, KY.

E. J. McDERMOTT.

WHEN DOES A CASE "ARISE" UNDER FEDERAL LAWS?

The constitution declares (Art. 3, Sec. 2), that the judicial power shall extend "to all cases in law and equity arising under this constitution, the laws of the United States," etc. When does a case arise under the constitution and laws, as those words are here used?

The judiciary acts of March 3, 1875, March 3, 1887, and August 13, 1888, provide that the circuit courts of the United States shall have jurisdiction "of all suits of a civil nature at common law or in equity * * * arising under the constitution or laws of the United States." When does a suit arise under the constitution or laws, as the words are used in these acts?

Passing the distinction between a "case" and a "suit," suggested by Mr. Justice Miller in the dissenting opinion in *R. R. Co. v. Mississippi*,¹ it would seem that the answers to these two questions should be the same, but an examination of the decisions of the Supreme Court shows that they are not the same.

The first case reaching that court after the act of 1875 was, apparently, *Gold-Washing & Water Co. v. Keyes*,² decided in 1877. The court there said (p. 203):

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved."

This case has been followed and applied from time to time since it was decided. It may be well to mention some of the decisions to show that it has not been departed from.

¹ 102 U. S. 135, 143.

² 96 U. S. 199.

In *New Orleans v. Benjamin*,³ the court said (p. 424):

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, then it is not a suit arising under the constitution."⁴

"The judicial power extends to all cases in law and equity arising under the constitution, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court, that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require, and if there be ground of complaint for their decision, the remedy is by writ of error under Section 709 of the of the United States require.⁵ Congress gave its construction to that part of the constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation."

In *Blackburn v. Portland Gold Mining Co.*,⁶ there were under discussion sections 2325 and 2326 of the revised statutes of the United States, which authorized the filing of an adverse claim to a mining location, and provided that the adverse claimant might commence proceedings in a court of competent jurisdiction to determine his rights. The court said (p. 576):

"It is claimed that the Circuit Court of the United States had jurisdiction because an adverse suit, or suit brought in support of a protest and adverse claim, under the provisions of Sections 2325 and 2326 of the Revised Statutes, is a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties."

After a discussion of the cases which had been decided with reference to those sections, it was held that the claim could not be supported, and that the circuit court had no jurisdiction.

The same sections were before the court for further consideration in *Shoshone Mining Company v. Rutter*.⁷ This

³ 153 U. S. 411.

⁴ *Shreveport v. Cole*, 129 U. S. 36;
Starin v. New York, 115 U. S. 248.
257; *Gold-Washing & Water Co. v.*
Keyes, 96 U. S. 199.

⁵ *Chicago, Etc., R. Co. v. Wiggins*
Ferry Co., 108 U. S. 18.

⁶ 175 U. S. 571.

⁷ 177 U. S. 505.

case was really a reargument of the former case; the court adhered to its previous decision, and said (p. 507):

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the constitution or laws of the United States, within the meaning of the jurisdiction clauses. And (p. 509), 'Inasmuch, therefore, as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the constitution and laws of the United States.' Also on (p. 513), 'So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that the suit is an adverse suit authorized by the statutes of congress is not in and of itself sufficient to vest jurisdiction in the Federal courts.'"

In *Western Union Tel. Co. v. Ann Arbor R. R. Co.*,⁸ the court said (pp. 243, 244):

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."⁹

In *Joy v. St. Louis*,¹⁰ the court said (p. 340):

"Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question. It is a long settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the constitution or the laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action." And (p. 341), "To say that there is a dispute between the parties as to the construction of the patent or of the several acts of congress referred to, does not raise a

⁸ 178 U. S. 239.

Portland Gold Mining Co., 175 U. S.

⁹ *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199; *Blackburn v.*

571.

¹⁰ 201 U. S. 332.

Federal question, because a statement that there is such a dispute is entirely unnecessary in averring or proving plaintiff's cause of action. His source of title, as set forth in the petition, might not be disputed, and the defense might rest upon the defense of adverse possession, as set up in the answer. If defendants contented themselves on the trial with proof of such defense, then no question of a Federal nature would have been tried or decided."

In *Devine v. Los Angeles*,¹¹ the court said (p. 332):

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed."

Finally, in *Louisville & N. R. R. Co. v. Mottley*,¹² the court said (p. 152):

"It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the constitution would arise, they do not show that the suit, that is, the plaintiff's cause of action, arises under the constitution."

Mr. Justice Moody cites nineteen cases in which he says this rule has been repeated and adopted.¹³

It is thus seen that a case is not within the act of 1875, 1887 or 1888, unless it has actually arisen, and it is not sufficient that it potentially arises during the progress of the suit.

Turning now to the constitution, it is to be observed that it was not until March 3, 1875, that the circuit court was

¹¹ 202 U. S. 313.

¹² 211 U. S. 149.

¹³ Nothing said or decided in *Ex parte Young*, 209 U. S. 123, 144, or in *Macon Grocery Co. v. Atlantic*

Coast Line R. Co., 215 U. S. 501, can be considered as overruling *Gold Washing & Water Co. v. Keyes*, and the cases that have followed it.

given jurisdiction of all suits arising under the constitution and laws of the United States. The judiciary act of 1789 conferred no such jurisdiction.¹⁴ Wherever, therefore, in the decisions of the Supreme Court prior to 1877 (96 U. S.) the phrase "arising under the constitution or laws" has been under consideration, the question has been, not what that phrase meant in an act of congress, but what it meant in the constitution. The discussion was over the constitutionality of some act of congress which had conferred jurisdiction on the national courts in a special class of cases.

In *Martin v. Hunter's Lessee*,¹⁵ the question was whether the twenty-fifth section of the judiciary act of 1789 conferring appellate jurisdiction upon the Supreme Court, with reference to the judgments of the supreme courts of the states, was constitutional or not. The same question was present in *Cohens v. Virginia*.¹⁶ In *Osborn v. U. S. Bank*,¹⁷ the question was whether an act of congress allowing the bank to sue and to be sued in the circuit courts was valid. In *The Moses Taylor*,¹⁸ the question concerned that section of the judiciary act of 1789 which made the jurisdiction of the United States courts exclusive in admiralty cases. In *Clafin v. Houseman, Assignee*,¹⁹ the revised statutes having provided that the jurisdiction of the United States courts should be exclusive in all matters and proceedings in bankruptcy, the question was whether that statute prevented a state court from taking cognizance of an action by an assignee in bankruptcy. In *Tennessee v. Davis*,²⁰ the question was whether section 643 of the revised statutes authorizing a criminal prosecution commenced against an United States revenue officer to be removed into the United States circuit court, was constitutional or not. In *Cleveland, Etc. R. Co. v. McClung*,²¹ it was held that the same section 643 of the revised statutes applied, although the collector in

¹⁴ *Bank v. Deveaux*, 5 Cranch, 61.

¹⁵ 1 Wheat. 306, 350.

¹⁶ 6 Wheat. 264, 430.

¹⁷ 9 Wheat. 802.

¹⁸ Wall. 411, 428.

¹⁹ 93 U. S. 130.

²⁰ 100 U. S. 257.

²¹ 119 U. S. 454.

his defense alleged that he did not do the act charged against him.

The question as to what the phrase means in the constitution having been presented in this way, it can be fairly said that the cases hold that it is within the power of congress to confer jurisdiction on the circuit courts in cases that *potentially* arise under the constitution and laws; any case that *may* involve a question arising thereunder can lawfully be put by congress within the jurisdiction of the circuit court.

In *Marbury v. Madison*,²² the court said (p. 173):

"The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present cases; because the right claimed is given by a law of the United States."

It is true that it was held in that decision that the Supreme Court had no jurisdiction of the case then under discussion; but that was because the judiciary act undertook to confer upon that court original jurisdiction in a case of mandamus, while under the constitution it could have only appellate jurisdiction in such cases.

In *Shoshone Mining Company v. Rutter*,²³ the court said (p. 506):

"Under these clauses congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of congress, but of its intent."

Chief Justice Waite, with whom Mr. Justice Miller concurred, dissenting in the *Pacific R. Co. Removal Cases*,²⁴ nevertheless said, on page 24: "I do not doubt the power of congress to authorize suits by or against federal corporations to be brought in the courts of the United States. That was decided in *Osborn's case*, and with it I have no fault to find."

²² 1 Cranch, 137.

²³ 177 U. S. 505.

²⁴ 115 U. S. 1.

Congress has conferred jurisdiction on the circuit courts in cases brought by or against national banks,²⁵ and yet it is apparent that a national bank might sue a person upon his promissory note, and the complaint not show that there was a dispute or controversy as to the effect or construction of any act of congress upon the determination of which the result depended. Congress has given exclusive jurisdiction to the circuit courts of all cases arising under patent rights, but, as said by Chief Justice Marshall in *Osborn v. United States Bank*:²⁶

"The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the consideration of an act of congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, nor establish the position, that the case does not arise under a law of the United States."

That this construction of the constitution was inevitable results from considerations which were expressed in the early days of the court. In *Cohens v. Virginia*,²⁷ the court said (p. 384):

"One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it, as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the principle, proves also the propriety of giving this extent to it." And again (p. 387), "No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others."

²⁵ *Kennedy v. Gibson*, 8 Wall. 498. ²⁶ 9 Wheat. 738, 826.

²⁷ 6 Wheat. 264.

In *Osborn v. Bank*,²⁸ the court said (p. 820):

"And if their existence are sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws and treaties of the Union—which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals—would be reduced to almost nothing." And again (p. 822), "And words obviously intended to secure to those who claim rights under the constitution, laws or treaties of the United States, a trial in the Federal courts, will be restricted to the insecure remedy of an appeal, upon an insulated point, after it had received that shape which may be given to it by another tribunal, into which he is forced against his will. We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original clause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

In *United States v. Reese*,²⁹ the court said (p. 217):

"Rights and immunities created by or dependent upon the constitution of the United States can be protected by congress. The form and manner of the protection may be such as congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

In *Logan v. United States*,³⁰ the court said (p. 283):

"Upon this question the court has no doubt. As was said by Chief Justice Marshall, in the great case of *McCulloch v. Maryland*, 'The government of the Union, though limited in its powers, is supreme within its sphere of action.' 'No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.'"

Wherever, therefore, there is a right created by the constitution or laws, congress has power to give to the circuit courts jurisdiction of all cases relating to it.

Returning now to the questions asked at the beginning, the answer to the first one must be, that a case arises under

²⁸ 9 Wheat. 738.

²⁹ 92 U. S. 214.

³⁰ 144 U. S. 263.

the constitution and laws of the United States, as those words are used in the constitution, when it *may* present a federal question; the answer to the second question must be, that a case arises under the constitution and laws of the United States, as these words are used in the acts of 1875, 1887 and 1888, when the case does present, according to the plaintiff's complaint, a dispute between the parties as to the meaning of the constitution or any law.

It may be said in passing, that the court in construing the act of 1875 adopted the claim made by Mr. Justice Johnson in his dissenting opinion in *Osborn v. Bank of the United States*.³¹ He said (p. 885):

"That until such a question actually arose, until such a case was actually presented, *non constat*, but the cause depended upon general principles, exclusively cognizable in the state courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States, at any previous stage," and (p. 886), "The judicial power extends only to 'cases arising', that is, actual, not potential, cases."

The two constructions given to the same phrase are well illustrated by the employers' liability act. The act as passed in 1908 gave the railroad employee when he was injured, certain rights against the company. It said nothing about where the actions to vindicate those rights should be commenced. If such an employee having been injured had brought a suit against the company, alleging only facts which showed that he was entitled to the benefit of the act, and the complainant made no allegation that there was a dispute between himself and the defendant as to the meaning and construction of the law, the action could not have been maintained in the circuit court, under the provisions of the original act; nor could the defendant, under that act, have removed the cause into the circuit court, if it had been commenced in a state court. This could not have been done, for it would not have been a case arising under the constitution or laws.³² Congress, however, having by the

³¹ 9 Wheat. 738.

³² *Nelson v. Southern Ry. Co.*, 172 Fed. 478.

act of 1910 expressly given the circuit court jurisdiction of all cases arising under the act, plaintiff can now, under such a bare complaint, maintain his suit in the circuit court.

It may be said that the two different constructions given to the same phrase came about in this way: In the early cases the question was not what congress had done, but what it might do. What it had done was perfectly plain: it had in one case expressly authorized the United States bank to sue and to be sued in the circuit court; in another it had expressly authorized a case to be taken from the supreme court of a state to the Supreme Court of the United States; in another it had expressly authorized national banks to sue in the circuit court; in another it had expressly authorized a suit against a collector to be removed, and in all these cases the intention of congress was plain. The only question was whether it had power to do what it had attempted to do. But when the act of 1875 came to be considered another question presented itself. No one has ever doubted that congress had power to confer upon circuit courts jurisdiction in cases arising under the constitution or laws of the United States. No one could doubt it, because the constitution says in so many words that the judicial power shall extend to such cases. Under the act of 1875 the question was, therefore, not whether congress had power to pass the law, but rather, to what cases did congress intend that the law should apply. That the court has been right in the two constructions which it has given to the same phrase seems apparent. If the national government was to be maintained, the court was certainly right in saying that the government had the power to give to its own courts the determination of all cases which had to do with rights created by that government. It was not bound to turn them over to the state courts at the beginning, even if it did retain in its own courts the power of review after the cases had passed through the state tribunals.

It was equally right in saying that by the act of 1875 congress could not have intended to burden the circuit courts

with all the cases that might by any possibility involve a question arising under the laws of the United States. It was said in *Shoshone Mining Co. v. Rutter*,³³ at p. 507:

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one which arises under the constitution or laws of the United States, within the meaning of the jurisdiction clauses, for, if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States or by virtue of its laws."

It can easily be argued that the intention of congress was that such potential cases should be left in the state courts until a federal question had actually appeared and been litigated, when it could be removed to the national tribunal if a defendant claimed that national rights had been denied. Such had been the law from the foundation of the government until 1875. It therefore seems that there is no real conflict between these two lines of cases.

There remain to be considered, however, several classes of cases which do apparently present such a conflict. The most striking class is that in which it is held that any corporation created by an act of congress can remove cases from a state court into the circuit court. The first of these cases is *The Pacific Railroad Removal Cases*,³⁴ foreshadowed in *Provident Savings Society v. Ford*,³⁵ decided on the same day. The plaintiff in error in four of the *Pacific Railroad Removal Cases* was the *Union Pacific Railway Company*, and in the other three cases the *Texas & Pacific Railway Company*. The charter of the *Union Pacific Railroad Company*, act July 1, 1862, 12 St. at Large, 489, provided in the first section that the company "shall be able to sue and be sued * * * in all courts of law and equity within the United States." The charter of the *Texas Pacific Railroad Company*, act March 3, 1871, 16 St. at Large, 573, provided in its first section, as follows: "And shall be

³³ 177 U. S. 505.

³⁴ 115 U. S. 1.

³⁵ 114 U. S. 635.

able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States." A decision that under these acts, a suit might have been commenced originally in the circuit court against either one of these companies would have been well within the decision in *Osborn v. United States Bank*.³⁶ But these seven cases were brought originally in a state court, and were removed to the circuit court. While the charters of the railroad companies, as has been seen, provided that suits might be commenced in the circuit court against the company, they did not provide that they might be removed into the circuit court if commenced in a state court; the Supreme Court, however, held that they could be so removed, under the act of 1875, the court saying (p. 11):

"We are of opinion that corporations of the United States, created by and organized under acts of congress like the plaintiff in error in these cases, are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the state courts, under and by virtue of the Act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.'"

This ruling was made exclusively upon the authority of *Osborn v. Bank of the United States*, it being based upon what was said in that case, rather than upon what was decided therein. The doctrine announced in this case has since been followed.³⁷

Another line of cases in apparent conflict includes those relating to suits against United States marshals. *Davis v. South Carolina*,³⁸ arose after the act of 1875. It was a suit against a marshal's deputy for acts done by him while assisting a revenue officer. It was removed into the circuit court from the state court under Sec. 643 of the revised statutes, which authorized a person sued in a state court for acts committed by him as a revenue officer, to remove the case into the circuit court. Inasmuch as the decision was

³⁶ 9 Wheat. 738.

³⁷ *Texas Pacific R. Co. v. Cody*, 166

U. S. 606; *Matter of Dunn*, 212 U. S. 374.

³⁸ 107 U. S. 597.

based upon Sec. 643, and not upon the act of 1875, it may be inferred that the court did not then consider that a suit against an United States marshal was a case arising under the laws of the United States, within the meaning of that act. *Feibelman v. Packard*³⁹ was, as the court said, not an action against the marshal for trespass, but was an action on his bond. It was observed that a bond was required to be given by Sec. 783 of the revised statutes, and that that Sec. 784 expressly gave a right of action thereon. It might be said that the removal in this case was based upon Sec. 784, and that the case does not necessarily hold that an action against a marshal on his bond was one arising under a law of the United States, within the meaning of the act of 1875. *Bock v. Perkins*⁴⁰ was, however, a simple action of trespass against a marshal and his deputies for an unlawful seizure of property under an attachment issued from a circuit court of the United States. It was brought in a state court, and was removed by the defendants into the circuit court, on the ground that it was a case arising under the laws of the United States, and this the Supreme Court held. The same ruling was made in *Sonnentheil v. Christian Moerlein Brewing Co.*,⁴¹ the court saying (p. 405):

"If suits against a bank or railways chartered by congress are suits arising under the laws of the United States, as was held in *Osborn v. U. S. Bank*, 9 Wheaton, 738, and in *Pacific Railway Removal Case*, 115 U. S. 1, with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category."

*Howard v. United States*⁴² was an action against a clerk of the United States circuit court upon his bond as such. The court said (p. 681):

"It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrent with the courts of the state) was entitled to take original cognizance, even if the parties had been citizens of the same state. Act of August 13, 1888, 25 Stat. 434, C. 866. This

³⁹ 109 U. S. 421.

⁴⁰ 139 U. S. 628.

⁴¹ 172 U. S. 401.

⁴² 184 U. S. 676.

court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States. . . . The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon a bond of a clerk of a court of the United States was not of the same class."

It seems difficult to reconcile the rulings in the cases of the federal corporations, cases of United States marshals and cases of the United States clerks, with the rulings and decisions commencing with the *Gold-Washing & Water Co.* case⁴³ and ending with the *Louisville & C. R. Co. v. Mottley* case.⁴⁴

One of the Pacific Removal Cases was an action by Myers, a switchman, against the railway company for an injury alleged to have been sustained by him through the carelessness of the company or its agents, in the construction of the coupling of its cars. It does not appear that the complaint in that action alleged that there was any controversy between the plaintiff and the defendant as to the construction of the charter of the defendant; and if there had been such an allegation, it would have been, under the decision in *Joy v. St. Louis*, entirely unnecessary. How can it be said that Myers' complaint did "really and substantially involve a dispute or controversy as to the effect or construction of a law of the United States, upon the determination of which the result depended?"

When Bock sued Perkins he alleged, so far as appears from the record in the case, nothing but his ownership of the property in question and its seizure by the defendant. It does not appear that in his complaint he even alleged that the defendant was an United States marshal. How can it be said that such a complaint presented upon its face any controversy as to the construction or effect of any law of the United States? It did appear in that case by the answer that the defendant was an United States marshal; but

⁴³96 U. S.

⁴⁴211 U. S.

the case does not even show that any allegation was made therein to the effect that any act of congress was to be construed, or that there was any dispute as to such construction. As was said in *Shoshone Mining Co. v. Rutter*, the suit might not involve any question as to the construction of the effect of any law of the United States, but might present simply a question of fact.

MINNEAPOLIS, MINN.

CHARLES A. WILLARD.

JEREMY BENTHAM, THE FIRST LAW REFORMER.

The eighteenth century had half run its course; George II was still on the throne—"snuffy old drone from the German hive," as Wendell Holmes calls him; Samuel Johnson was "enriching the pages of the *Gentleman's Magazine*," to use Boswell's phrase; Lord Mansfield was developing the "law merchant" by a series of masterly decisions; John Wesley was hard at work on his missionary journeys through England; Rousseau was writing his epoch-making *Origine des Sociétés*, when in a quiet backwater in the City of London, in an old house in Red Lion-lane, close to St. Aldgate's Church, a little boy—small, shy, and sensitive—was growing up with little more companionship than that of his own thoughts. No star came and stood over his birthplace; no angels sang; yet in that youthful mind were germinating ideas from which was to spring a new social era, a rich harvest of beneficent legislation. The greatest happiness of the greatest number is the motto of modern democracy, "the only possible, the only conceivable principle," as Sir H. Maine says, "which can guide legislation on a grand scale, and that it is so is chiefly due to Bentham's influence."

CHILDHOOD IN RED LION-LANE.

It was a curious little household in Red Lion-lane. The father was an ambitious attorney, worldly minded and pushing, who had inherited a good deal of money from his father, a city pawnbroker. The mother was the daughter of a draper at Andover, a sweet, affectionate woman—"all the females of our family," says Bentham, "were amiable, kind-hearted, and generous"—but, like the wives and mothers of that day, her horizon was bounded by her home, the still-room and the best parlor. Little Jeremy was the pride of his parents' hearts, and by way of being an infant prodigy. One day

when he was only three his parents, returning from a walk, found him perched on a high chair at a table, with a lighted candle on each side of him, absorbed in the reading of a huge folio of Rapin's History. The scene might do for a companion picture to that of the child Handel discovered by his family seated in his nightgown at an old harpsichord in the attic and discoursing sweet music in the stillness of the night. Little Jeremy had to fall back on Rapin, for no light literature was to be got. His mother, as a point of principle, refused him access to every book by which amusement might in any shape be administered, both parents thinking there was "contagion" in them. Picture his delight, then, when the first book which his French teacher, M. La Combe, put into his hands was a collection of fairy tales. It opened with the history of Les Petit Poucet and the Ogre Family; then there was Roquette à la Houpe, Cinderella, the Belle du Bois Dormante, the Chat Botté, and Fenette and her Naughty Sisters—Nonchalant and the other. "How did I joy," he says, "over the administration of poetic justice in its most admirable shape when Nonchalant, the wicked would-be seducer, having popped himself into the barrel full of razors and serpents which he had prepared for his intended victim, was himself rolled down the mountain in her place!"

THE YOUNG TELEMACHUS.

But a book which, if less entrancing than fairy tales, left a deeper impression on the moral side of his mind was that classic of juvenile French literature, *The Adventures of Telemachus*. "That romance," he says—he was only six or seven when he read it—"may be regarded as the foundation stone of my whole character: the starting post from which my career of life commenced. The first dawning in my mind of the principles of utility may, I think, be traced to it. One scene in particular left a strong impression. It is where Telemachus comes to Crete and finds them choosing a king. Each candidate has to give his answers to certain questions on the right method of government. The answers of one

came very near the doctrine of utility; but this candidate only came in second best. The prize was adjudged to Telemachus, whose notions seemed to me a short but still too long tissue of vague generalities, by which no clear impression was presented to my mind. It was too much of a piece with Lord Bacon's notion of a good government and his principles of legislation, ending with 'to generate virtue in subjects, *generare virtutem in subditis*.' I was disappointed, and the recollection of my disappointment still dwells in my mind." But the book fired his young ambition. Why, he said to himself, should not he be a Telemachus?

THE PHILOSOPHER OF WESTMINSTER SCHOOL.

A youthful philosopher revolving theories of government in this way at the age of eight was not likely to find the rough life of a public school a very agreeable environment, especially a philosopher of very small stature, and a weakling, as Bentham was—"the feeblest of feeble boys." Home, the old house in Aldgate, he used to say, was his earth. Browning Hill, Reading, where his grandmother lived, a charming old country house, with its village green, its gardens, orchard and venerable elms, its granary with the rusty old sword in it which the children used to brandish against the rats—this was his paradise. Westminster School was "hell," the instruction "miserable," the fagging a "horrid despotism." His father had fixed on Westminster for him because it was favored by so many scions of nobility, and he wanted his son to "make his way among the great." One day the Duchess of Leeds, who had two sons at the school, sailed through the playground, and, seeing little Bentham at play with some of the other boys, she called him to her. "You know who I am?" "No, madam, no; I have not that honor." Something in the reply pleased the Duchess, and she asked him to go home with her sons, and the Duke introduced him to the company. "This is Bentham, a little philosopher," said he. Bentham's father, who was always dinning into his head the necessity of pushing forward, hailed this visit to the

Duke of Leeds as the making of his son's fortune. Everything, he would say, was to be done by pushing. "Pushing," he would repeat, "pushing is the one thing needful." "But pushing," as Bentham adds, "was not congenial to my character." Indeed, all his life he suffered severely from bashfulness. In the same spirit of push and making his son into a little man before his time, Bentham's father sent him to Oxford (Queen's College) at twelve.

BLACKSTONE'S LECTURES.

Here he profited as little as at the bear garden at Westminster. He found the society of the place either "stupid or dissipated." His tutor spent most of his time playing cards. Infidelity—and that of the coarsest type—was rife. But one lasting benefit he did derive from his sojourn at the university, springing from the stimulus of antagonism. He attended Blackstone's lectures—the lectures on which the famous Commentaries were based—and listened with "rebell ears" to the commentator's theories of "natural rights" and the origin of society. It was the desire to expose the fallacies which he thought he detected there which prompted his first work, *A Fragment on Government*, in 1776. Blackstone's complacent optimism, his belief in English law and the English Constitution as the best of all possible arrangements, exasperated the critical and reforming mind of Bentham. Blackstone's manner, too, gave him offence. He was a "formal, precise, and affected lecturer, cold, reserved, and wary, exhibiting a frigid pride." But theories of government had for the time to be put aside. His father was bent on his going to the bar and making a name. It is interesting in these days, when there is talk of reviving the "students' box" in court, to find a place being taken for him as a student in the Court of King's Bench, Westminster. To secure the seat during term his father had to give the crier of the court a fee of 7s. 6d. This seat, which was one of four, was immediately below the officers, under the judges. In former days room had been reserved for two students on each side of the

judge on the bench, but Lord Kenyon put an end to this usage.

THE "DEMON OF CHICANE."

Besides providing him with a seat in the King's Bench, Bentham's father had put into his hands, to inspire him with legal ambition, the *Life of Lord Chancellor Clarendon*, then just published; but its effect was quite neutralized by another "precious" autobiography which fell in his way about the same time—that of *Constantia Philips (Memoirs of a Courtesan)*. This young lady had suffered much at the hands of the law. There is an account in it of some scandalous proceedings at Doctors' Commons by which her husband set aside their marriage. "Ding-dong," says Bentham, "went the tocsin of the law. Tossed from pillar to post was the fair penitent—from courts spiritual to courts temporal, from courts temporal to courts spiritual, by Blackstone called courts Christian.' Lengthy, of course, was the vibration. Particulars of it are not remembered, nor matters it that they should be. What is remembered is that while reading and musing the Demon of Chicane appeared to me in all his hideousness. What followed? I abjured his empire. I vowed war against him. My vow has been accomplished, with what effect will be acknowledged when I am no more."

Deeply imbued with these prejudices against law and lawyers, "I went to the bar," says Bentham, "as a bear to the stake. On my being called I found a cause or two at nurse for me. My first thought was how to put them to death, and my endeavors were not, I believe, altogether without success. A case was brought to me for my opinion. I ransacked all the codes. My opinion was right according to the codes, but it was wrong according to a manuscript unseen by me and inaccessible to me—a manuscript containing the report of I know not what opinion, said to have been delivered before I was born, and locked up, as usual, for the purpose of being kept back or produced according as occasion served. This incident, the forerunner of so many others, added its fuel to the flame which Constantia had lighted up."

THE PHILOSOPHIC LIFE.

Naturally all this was extremely disappointing to his ambitious parent, who regarded him in the light of a "lost child," and a stepmother, whom his father gave him about this time, and with whom he did not get on, helped to widen the breach. Accordingly, the next scene shifts to a garret in Lincoln's-inn, where young Bentham is found living his own life on an allowance of £90 a year from his father, and getting gleams of practical philosophy from Montesquieu, Harrington, Beccario, and Helvetius. Most of all, Helvetius, the French philosopher, set him on the principle of utility, but it was from a pamphlet of Priestley that he got his catch phrase, summing up his philosophy, "the greatest happiness of the greatest number." "In this phrase I saw," he says, "delineated for the first time a plain as well as a true standard for whatever is right or wrong, useful, useless, or mischievous in human conduct, whether in the field of morals or politics." He felt as the discovery dawned upon him all the sensations of Archimedes, or of Cortez when he first gazed on the Pacific. "When I had sketched a few vague notions on the subject I looked delighted at my work. I remember asking myself, Would I take £500 for that sheet of paper? Poor as I was, I answered myself, No, I would not!"

UTILITARIANISM AND THE GREATEST HAPPINESS PRINCIPLE.

Now what was this great discovery of Bentham's which so elated him? Let us try and understand it. Looking around him, Bentham saw that men do not base their conduct on any settled principle. One man will say "my moral sense tells me" that such or such a course is right or wrong. Another says "my common sense tells me," or "my understanding." Another talks about the law of nature, right reason, the fitness of things. Another boasts himself one of the elect, knowing the will of God. And so on. All these may or may not be right in their conclusions. But how are we to know? says Bentham. It may be merely sympathy

or antipathy. What we need is an external standard, and this standard or test Bentham found in utility. Actions are right or wrong—this is his formula—so far as they tend to make or mar the general happiness, the happiness of the greatest number. Utility is the “master key” to conduct, and by it “morals become as clear as mathematics.”

John Stuart Mill tells us in his Autobiography how on reading these remarks of Bentham the feeling rushed upon him that all previous moralists were superseded, and that here indeed was the commencement of a new era in thought. But it is one thing to define in this way the goal of human endeavor, and quite another to determine the means by which it is to be attained. Bentham tries to work out his thesis by an elaborate analysis of pleasures and pains as the determining factors of human conduct. But here Bentham's system breaks down. The problem of conduct (even if we are prepared to admit it to be determined by a balance of pleasures and pains) is far too complex to be solved by *à priori* arguments. It can only be solved by societies finding out from experience the general principles of conduct conducive to social welfare, working out their own salvation with much travail of experiment—success and failure. This is what societies have done in the past, and are still doing—summing up the results in their moral systems, their civil and criminal codes. Bentham's merit lay not in his barren analysis of pains and pleasures, but in his concentrating attention on the end to be achieved. But why, if this is so, it may be asked, is Bentham to be credited as with an epoch-making discovery? The greatest happiness of the greatest number is a principle as old as the Twelve Tables. Is not *Salus reipublicae suprema lex esto* writ in the forefront of them? And therein better expressed, because the welfare of the people is a sounder ideal than the happiness of the people. Had not the test, if not the very phrase, been already used by Helvetius and Hume and Priestley. By what right, then, did Bentham appropriate it? The answer seems to be that with Bentham the principle had all the glamour of a

new discovery, because it synchronized with the remarkable spread of the democratic principles at the end of the eighteenth and beginning of the nineteenth century—the doctrine of the rights of the people, the new spirit of humanitarianism which was abroad. Government was thenceforth based on a definite principle. It was to be government of the people by the people for the people. All over the Continent Bentham's writings—in the French dress of Dumont's text—were hailed with enthusiasm as exhibiting the philosophic basis of popular rights and the true goal of all sound legislation. He was made a citizen of France, and when, years afterwards, he visited Paris he received the most flattering attentions. On one occasion when he entered a court of justice all the barristers rose up in token of respect, and the President seated him at his right hand. It is this championship of democracy which gives him the right to the title, by which he described himself in his last will, of “the founder of the greatest happiness system in morals and legislation.”

AN INVITATION TO BOWOOD.

While revolving these high themes of social regeneration in his Lincoln's-inn garret Bentham received a visit from no less a personage than Lord Shelburne, the then prime minister, afterwards Marquis of Landsdowne. Lord Shelburne had been much impressed with reading Bentham's *Fragment on Government*, and he invited the author to come and pay him a visit at Bowood. There he was introduced to a large circle of distinguished men and charming women. There he met Lord Camden, Dunning (afterwards Lord Ashburton), and Mr. Pitt. Pitt, he records, was “very good-natured.” “I was monstrously frightened at him,” he adds, “but when I came to talk to him he seemed frightened at me.” The ladies petted him, and Lord Shelburne made him read them some of his dry metaphysics, to which they listened with feminine docility. To keep a tame philosopher on the premises had long been a fashion on the Continent.

But philosophers are human; they are not proof against the tender passion, and Bentham, like Teufelsdorf, found his Blumine at Bowood in the person of Miss Carolina Fox, a charming girl, the niece of his host. Like Teufelsdorf, his suit was unprosperous, but he could say with Gibbon, "I feel dearer to myself for having been capable of this elegant passion." It was the one romance of Bentham's life, and at eighty-two, after fifty years of dreary codifying, the memory at this early attachment was as fresh and tender as ever. How true it is—

"You make break, you may shatter the vase, if you will,
But the scent of the roses will cling round it still!"

Bentham was always grateful to Lord Shelburne for his recognition and for the kindness he received from the household at Bowood. It came just at the time when he was, as he says, "cowed by past humiliation." It opened his heart, unsealed the fount of feeling in him. Lord Shelburne "made him a man again, raised him from the bottomless pit of humiliation. He made me feel I was something." It encouraged him to persevere with his life work.

LAW REFORM.

He had formulated his great fundamental principle—his *novum organum*—and now he set himself to apply it to an all-round methodical reform of the constitution, of the civil and criminal law (particularly the principles of punishment), of the law of evidence, of political economy. "A law maker by trade" is what he calls himself. Looking back, it is remarkable how many of the reforms which he urged are today accomplished facts or on the way. Among the political reforms which he advocated were universal suffrage, annual Parliaments, the payment of members, and vote by ballot. In the matter of the civil law his constant aim was the simplification of law and procedure—slowly realized in the Common Law Procedure Acts and the Judicature Acts—to the confusion of technicality and chicanery, and for this end he labored incessantly at codification. At eighty-two

he was still "codifying like a dragon." But the most valuable part of his work is his examination of the true principles of criminal law or penal legislation—a country then unexplored, which he carefully mapped out. One of his pet projects for the reformation of offenders was a model prison, which he called the Panopticon, so constructed that a person placed at the center could see what every inmate was doing.

FORD ABBEY: A PERSONAL DESCRIPTION.

On his father's death Bentham had succeeded to a considerable property. He had always loved the country, a garden, and flowers, and now he could gratify his tastes he took a fine place at Chard, in Somersetshire—Fort Abbey. It was a superb residence, dating from the twelfth century, with chapel, cloisters, and corridors, a hall 80 ft. long by 30 ft. high, and a great dining parlor. The grounds in which the abbey stood were what the French call *riant* and secluded, umbrageous, and full of the sound of falling waters. Here he was visited by many friends, among others by the elder Mill, his most devoted disciple, with his son, John Stuart Mill, and it was Ford Abbey which suggested to the younger Mill the striking observation in his Autobiography that "Nothing contributes more to nourish elevation of sentiment in a people than the large and free character of their habitations. The Middle Age architecture, the baronial hall, and the spacious and lofty rooms of this fine old place, so unlike the mean and cramped externals of English middle-class life, gave the sentiment of a larger and freer existence, and were to me," he says, "a sort of poetic culture." Another visitor to Ford Abbey was Sir Samuel Romilly, and his description is worth quoting as the best picture of the sage's mode of life. "We found," he says, "my old and valued friend passing his time, as he has always been passing it since I have known him, which is now more than thirty years, closely applying himself for six or eight hours a day in writing upon laws and legislation and in composing his civil and criminal codes, and spending the remaining hours

of every day in reading or taking exercise by way of fitting himself for his labors, or, to use his own strangely invented phraseology, 'taking his ante-jentacular and postprandial walks' to prepare himself for his task of codification. There is something burlesque enough in this language, but it is impossible to know Bentham and to have witnessed his benevolence, his disinterestedness, and the zeal with which he has devoted his whole life to the service of his fellow-creatures without admiring and revering him." Battledore and shuttlecock was his favorite indoor pastime. Bentham's out-of-doors get-up was distinctly peculiar. He wore a plain brown coat cut in the Quaker style, light brown kersemere breeches, over the knees of which he usually exhibited a pair of white worsted stockings; list shoes, and merino-lined gloves. The whole was surmounted by a narrow-brimmed straw hat of most grotesque and indescribable shape, strongly contrasting with the sobriety of his appearance, from under which his venerable locks floated over his bare neck and collar and down his back. He never went out without his stick "Dapple" for a companion, and he wended round the walks of his garden—or "circumgyrated it," to use his own phrase—at a pace which was more than a walk, but not quite a trot.

THE HERMIT OF QUEEN'S-SQUARE.

Later in life he settled in London at Queen's-square-place in a retired house leading out of Birdcage-walk, St. James' Park. There was a sequestered garden to the house. Shrubberies ornamented the courtyard. Flowers bloomed on the window-sills. It was a little oasis, and the seclusion of it, with the simple, retiring habits of the owner, got Bentham the name of "the hermit of Queen's-square." But there was nothing morose or unsocial about him. He entertained friends freely, always remembered their special tastes, and pleased himself with ministering to them. But time was precious to him, and he would not suffer it to be frittered away in idle chatter; also a certain bashfulness clung to him all through life. Miss Edgeworth's father

called once to see him. "Tell Mr. Bentham," he said to the servant, "that Mr. Richard Lovell Edgeworth desires to see him." The message came back: "Tell Mr. Richard Lovell Edgeworth that Mr. Bentham does not desire to see *him*."

He was very fond of "pussies," as he called them, as of animals generally. One particular favorite he had of the tabby kind, of whom he used to boast that he had "made a man" of him. This puss got knighted, and rejoiced in the name of Sir John Langhorne. In his early days he was gay and frisky, but later on he became sedate and thoughtful, laid down his knightly title, and was installed as the Rev. John Langhorne. He gradually obtained a great reputation for sobriety and learning, and a doctor's degree was conferred upon him, and he became the Rev. Dr. John Langhorne. He was supposed to be very near a mitre when he died. From all which we may see that Bentham, besides being a great jurist, was an unconventional person with a keen sense of humor. A striking trait in him is his splendid self-confidence. Thus is the strain in which he addresses the Duke of Wellington in 1828: "Lord Duke, listen to me. Your name will—ay, shall—be greater than Cromwell's. Already you are, as in his day he was, the hero of war. Listen to me and you will be what he tried to be, but could not make himself—the hero of peace, of that peace which is the child of justice." If the Duke would not listen, if Bentham could not see "his plays acted," he comforted himself with the reflection that after his death he would be enthroned by mankind as a benevolent "despot."

When the end drew near he asked his doctor if there was any hope. The doctor was constrained to say there was none. "Then minimize pain," said Bentham, with characteristic decision. Leaning on his elbow in an attitude of profound and solemn meditation, "What a multitude of things there are," exclaimed the dancing master Marcel, "in a minuet!" May we not now add, says Bentham at the close of his *Morals and Legislation*, "and in a law"? Yes!

And here is Bentham's true title to fame. He was often right, often wrong; but he forced men to reflect on the problems of law and legislation, to see how much there is in a law—forced them to ask themselves whither they are going, and why.—*Law Times* (Eng.).

THE CONSTITUTIONALITY OF THE FEDERAL PAROLE LAW.

An act to parole Federal prisoners, passed at the last session of Congress,¹ raises the question of the constitutionality of a parole law under our Federal Constitution. To answer this question, it is necessary to consider the analogy of state parole laws and the general trend of Federal decisions on similar points.

Parole laws are of quite recent origin—the first for adults being enacted in Ohio in 1885—but they now exist in about three-fourths of the states. In several of these jurisdictions, they have been attacked as unconstitutional on the ground that they infringe on the judicial power to fix sentences and on the power of the executive to grant pardons, but in most jurisdictions (under similar constitutions) such laws have never been questioned and their constitutionality has been simply taken for granted.

The objection that a law providing for the parole of a prisoner by the warden or a board of parole infringes on the judicial power to fix the sentence has usually been dismissed summarily. Courts have done their duty and their power is exhausted when they have adjudged against the prisoner the penalty affixed by the legislature to the offense and an executive or ministerial board may be directed to determine the minimum of actual imprisonment without in any way infringing on the judicial power.²

State v. Page,³ discusses the judicial power to fix sentences and says: “into every sentence of conviction, the terms and conditions which beforehand the legislature had prescribed, enter as much as though they were written into

¹ June 25, 1910, 36 St. at L. 819.

² *George v. People*, 167 Ill. 447;
Miller v. State, 149 Ind. 607; and

People ex rel. Clark v. The Warden, 39 Misc. 113.

³ 60 Kas. 664, 667.

and made a formal part of the record of sentence.” Under this reasoning, the provision for the parole of prisoners is considered a condition prescribed by the legislature in the exercise of its undoubted power to fix the penalty for crime and the judge’s power to sentence and his discretion, between the limits always laid down by statute, remain the same. In the case of parole under a purely indeterminate sentence, the judge’s discretion does seem at first glance to be given over entirely to ministerial officers but it is not necessary to consider that question in connection with the federal law since that provides simply for parole under definite sentences imposed as heretofore by the courts.

The second objection—that a parole law infringes on the pardoning power—has been urged far more and deserves careful examination. The argument is that a parole is a form of conditional pardon and therefore should be granted only by the governor, or the board of pardons, as the case may be, under the specific grant of the pardoning power in the constitution. This allegation involves the distinct questions: 1. Is a parole a conditional pardon? 2. Is the pardoning power exclusively in the executive?

On the first question, under similar state constitutions, there are two lines of decisions—one holding that a parole is in fact a conditional pardon and the other holding that it is a mere prison regulation. The latter seems to be the prevailing view.

The leading case holding that a parole is a conditional pardon is *People v. Cummings*.⁴ The court in that case says: “If it be considered that the only power conferred (by a Michigan statute authorizing parole of prisoners) is a conditional release upon parole, still, if the prisoner keeps his parole, or rather, if the board are of the opinion that he does, the release is in fact an absolute one. By what refinement of reasoning it can be made to appear that this is not in effect a pardon of the prisoner, is beyond my

⁴ 88 Mich. 249.

comprehension." The court questions the meaning of parole thus: "Can they (the board of control) let one man out, not to go beyond a five-mile limit, another to keep within the county where the prison is located, the third to keep within the congressional district," etc.? and concludes that "if they have the power to release upon conditions, these conditions may be made so trifling as in fact to be no conditions at all." Of course, as a matter of fact, most parole laws meet this practical objection by providing for substantial conditions. However, aside from its doubt of the practicability of the system, the Michigan court holds clearly that a parole is a pardon on conditions and that the act establishing the parole system was therefore unconstitutional. In passing, it may be remarked that the practical result of this decision was the adoption of an amendment to the Michigan constitution (November, 1902) explicitly authorizing the legislature to provide for the release of prisoners on parole and thus, the progress of parole laws was not materially retarded.

A more carefully reasoned argument which reaches the same conclusion is found in Opinion of the Judges *in re Conditional Discharge of Convicts*,⁵ but this has of course the disadvantage of being merely advisory and has not the weight as a precedent of a litigated case. "A conditional discharge," said the Vermont Court, "under the provisions of this statute is not unlike a conditional pardon except in name, which is of but little consequence. . . . A discharge under the statute embraces all within the punishment except that which has already been executed and if the prisoner performs the conditions imposed, he is forever free from further execution. A pardon with like conditions under the executive prerogative can do more; for, . . . neither is a remission of guilt." The Court consequently advised the governor that that part of the statute which provided for paroling convicts by the board of prison commissioners was unconstitutional and void.

⁵ 73 Vt. 414.

One further case declaring parole statutes unconstitutional as infringements on the pardoning power should be noted—that is, *State v. State Board of Corrections*,⁶ which arrives at the result by quite different reasoning—it expressly decides that a parole is not a pardon but that it is a commutation and the power to grant commutations is given to the board of pardons by the Utah constitution. The court says: “The restrictions, inconveniences, and exactions which the parole imposes upon the convict while at large, and his liability again to be taken into custody and actual imprisonment, and the humiliation and disgrace that attend such a life, constitute punishment. While it is much less in degree than actual confinement in a cell, or within prison walls, it is nevertheless legal punishment. . . . One punishment known to the law is changed to another punishment known to the law, and this is commutation.”

The usual phraseology in constitutions is, “the governor (or board of pardons) shall have power to grant *reprieves, commutations and pardons*—the resemblance of parole to a reprieve certainly seems slight but even that has been taken as a ground for considering a parole law unconstitutional, though only in a dissenting opinion,⁷ where Judge Guffy says, “Bouvier’s Law Dictionary adopts Blackstone’s definition of reprieves as follows: ‘The withdrawing of a sentence for an interval of time which operates in delay of execution.’ The parole provided for by the act under consideration is clearly a reprieve and nothing else.”

Turning to the other line of authorities—those holding that a parole is not a pardon—the leading case is *Ohio v. Peters*.⁸ This case was decided in 1885 and has been admittedly followed in many jurisdictions and has doubtless forestalled question in many others. The view of parole taken by the Ohio court is that it is a part of prison discipline and therefore a matter within the legislature’s power

⁶ 16 Utah. 478.

827.

⁷ *George v. Lillard*, 106 Ky. 820.

⁸ 43 Ohio St. 629.

to regulate the punishment of crimes. The court points out the distinction that under this parole as the statute expressly provides, the convict remains in the legal custody and under the control of the board, whereas under a conditional pardon, so long as the individual keeps the conditions, he is his own master as much as any other individual. The court also draws a parallel between parole acts and acts enlarging jail limits and concludes that a parole does little more than to enlarge the prison bounds to the entire state.

The case of *George v. Lillard*,⁹ likewise holding that a parole is not a pardon cites an additional reason, namely, that the governor could at any time after the parole, pardon the prisoner.

A New York case,¹⁰ sustaining the constitutionality of a parole act, relies partly on the clause usually inserted in parole laws that "nothing herein contained shall be construed to impair the power of the governor of the state to grant a pardon or commutation of sentence" as answering the objection. However, it is doubtful if such a saving clause would have a very binding effect on a court which believed that as a matter of fact the act did impair the pardoning power.

The statement of the court in *State v. State Board of Corrections*,¹¹ that a parole is a commutation is frequently contradicted by other courts but the only case discussing the statement at length is *George v. Lillard*, where the Court says: "It is not a commutation of the sentence, because it is not a change of the punishment of a person who has been condemned into a less severe one. . . . While, in the case of paroled prisoner he enjoys his liberty outside of the walls of the penitentiary, yet he remains under the sentence to which he has been condemned, and may be reimprisoned at any time, as we have heretofore said. So, strictly speaking, it cannot be said that there has been a

⁹ *Supra*.

¹⁰ *People ex rel. Clark v. The War-*

den, 39 Misc. 113.

¹¹ 16 Utah, 478.

change of punishment to a less severe one." Two further distinctions between parole and commutation may be pointed out—the original sentence remains as valid as ever under parole, whereas after commutation, the original sentence is obsolete; and, again, the gist of the punishment of imprisonment is not the iron bars of the prison—the Utah court to the contrary notwithstanding—but the restraint of liberty by officers of the law and this restraint is equally present under parole. Probably most courts have thought these distinctions too obvious to require statement.

Considered in another light, a parole law simply authorizes a board of managers to allow the prisoner to go outside the inclosure of the penitentiary for a part of his term—this permit really differs from permits of liberty about the grounds to "trusties" only in degree not in kind. Again, a pardon is a specific act of grace or clemency to one prisoner—a parole is given as judicious treatment, is almost a matter of right and course to every prisoner who performs certain conditions (though there is usually some discretion vested in the board).

One further distinction may be pointed out—a pardon operates directly on the crime and only indirectly on the criminal,¹² in other words, it blots out the offense; a parole on the other hand, leaves the offense untouched and simply operates on the criminal. Moreover, the indirect effect which a pardon has on the criminal, is not the same as that of a parole; a pardon cleanses the prisoner from guilt—a conditional pardon of course on conditions¹³—but a parole has no such effect; it simply releases the prisoner from the confinement of the prison during his good behavior.

As stated above, the view that a parole is not a conditional pardon is supported by the greater number of authorities and may safely be assumed in many states where the

¹² *Commonwealth v. Holloway*, 42 Pa. St. 446, 448.

¹³ *Carlisle v. U. S.*, 16 Wall. 147; *Ex parte Garland*, 4 Wall. 333.

question has never been raised in the courts. It is perhaps noteworthy in this connection that the most recent case decided on parole laws—*People v. Joyce*,¹⁴ decided June 29, 1910,—adopts this view. To the writer, it seems also the better supported in reason. The origin and concept of parole have been very different from that act of grace of a divinely appointed king which was the primary concept of a pardon and the fact that the practical effect of parole may in certain cases be the same cannot retroact and change the nature of the act or process.

To come to the second question—is the pardoning power of the executive exclusive? In only one state constitution—that of Connecticut—is there no grant of pardoning power. In most states, the constitutions give this power to the governor alone but in about a third it is given to him and others constituting a board of pardons. However, whether the grant be to governor or board of pardons, the prevailing view is that such grant is exclusive and that the legislature cannot grant pardons.¹⁵ This view seems predicated by some on the theory that a specific grant of a power to one branch of the government impliedly forbids it to the other branches and by others on the theory that pardon is naturally and necessarily an executive function and could not be exercised by the legislature in any event.

The first proposition is based on the fact that while American legislatures have the same unlimited powers in regard to legislation which reside in the British Parliament, our constitutions expressly give the judicial and executive functions to separate departments and as all three derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.¹⁶ This rule is of course well established, yet the reasoning of U.

¹⁴ 246 Ill. 124.

¹⁵ *State v. Sloss*, 25 Mo. 291; *Haley v. Clark*, 26 Ala. 439; *Op. of*

Justices, 73 Vt. 414; *Parker v. State*, 135 Ind. 534.

¹⁶ *Cooley on Constitutional Limitations*, 6th ed., 104.

S. v. Hall,¹⁷ placing the "inherent power of the supreme law-making power" (of states) above the "executive power by constitutional provision" seems better. To quote from the opinion: "From the very nature of government, it requires no reasoning to prove the self-evident proposition that in Pennsylvania the power of pardon was vested in the legislative branch by the inherent power of the supreme law-making power and in the executive by constitutional provision. The grant of this power to the executive was no limitation on the right of the power granting it to exercise it alone." This reasoning is not so applicable to the Federal legislature since that has no inherent power but only what is conferred upon it by the Constitution.

One other case upholding a legislative pardon should be noted—*People v. Stewart*,¹⁸—this, however, was decided by a territorial court and the opinion is very brief.

The question whether pardon is naturally and necessarily an executive function seems more or less academic since the Federal constitution and all the state constitutions (except Connecticut, as stated above) make specific grants of the pardoning power; however, the assertion is frequently made that it is necessarily an executive function and doubtless this view influences courts to a sharper scrutiny of an act of legislature attacked as an infringement on the pardoning power.

The assertion is usually supported by the analogy to the English King's power.¹⁹ This is a false analogy since the king had the pardoning power, as Lieber points out,²⁰ "not because he was considered chief executive but because he was considered sovereign while with us, the governor or president has but a delegated power and limited sphere of action which by no means implies that we must necessarily delegate along with the executive power also the pardoning power."

¹⁷ 53 Fed. 352.

¹⁸ 1 Idaho 546.

²⁰ *Civil Liberty and Self Government*, Vol. 2, p. 147.

¹⁹ *U. S. v. Wilson*, 7 Pet. 150; *Ex parte Wells*, 18 How. 307.

This language is quoted in *State v. Nichols*,²¹ and the Court adds: "From this it would seem that the pardoning power is not naturally or necessarily an executive function. . . . The executive no more represents the sovereignty of the state than either one of the other branches of the state's government. The pardoning power no more vests in the governor, by virtue of his position, than it does in the judicial branch of the government, when the constitution is silent." In the same case, an inference in support of the theory is drawn from a remark of Chief Justice Chase in *U. S. v. Padelford*.²² "In a question involving the discussion of the pardoning power of the president, Chief Justice Chase says that the president had the pardoning power without any act of Congress, *but that if he did not, the act of Congress would have been sufficient to have given him the power*—thus conveying the impression that if the pardoning power was not vested in the President by the constitution, that Congress had the power to confer it on him. . . . If the pardoning power is peculiarly an executive function, it is not at all probable that Chief Justice Chase would have made the remark he did, in the *United States v. Paddleford*, 9 Wall. 542."

Further support of this theory is found in Story's statement²³ that at the time of adopting the Federal constitution, the expediency of vesting the pardoning power in the president in *any* cases was doubted.

It might be said in passing that the analogy between pardons by Act of Parliament and pardons by Congress or the state legislatures discussed in *U. S. v. Wilson*,²⁴ is hardly better (as far as the *power* to pardon is concerned) than the analogy between the King's and President's (or governor's) since neither king nor Parliament recognizes any constitution as the source or measure of their powers.

In general it may be said that the attitude of state courts as to parole is that it may be upheld as a part of prison

²¹ 26 Ark. 74, 76.

²² 9 Wall. 542.

²³ Story on the Constitution, Sec. 1499.

²⁴ 7 Pet. 150.

discipline and that it is not a pardon and therefore can raise no constitutional questions as to interference with the executive. How close is the analogy between federal and state parole laws?

Of course the general rule applies—that acts of Congress, not specifically forbidden by the constitution, have not the same presumption of authorization that acts of state legislatures have, since the government of the United States is one of enumerated powers; but once the power of Congress over the general subject is established, their acts are construed quite as liberally as acts of the State legislatures. The power of Congress to provide for the punishment of crime has always been admitted,²⁵ so that if the federal courts follow the reasoning that a parole is a part of prison discipline, Congress would be conceded the same general power as the State legislatures and the result reached would undoubtedly be the same.

Again, speaking generally, the president's power is far greater than any governor's under a state constitution—but on this specific point, the power of the two executives seems practically the same and an act held not to infringe on a governor's power would probably be held not to infringe on the president's power.

As to the objection that a parole law infringes on the judicial power, it seems unlikely that it will be raised again, since it has been so lightly considered in the past—however, the analogy between state and federal powers is close here.

Our second source of suggestions as to the probable chances of the federal parole law being upheld is the general trend of federal decisions on the pardoning power—since this unquestionably offers the most vital point of attack.

The president's power to pardon has been liberally construed—it includes amnesty;²⁶ it includes commutation;²⁷

²⁵ *U. S. v. Fox*, 95 U. S. 670; *U. S. v. Hall*, 98 U. S. 343, 346; *Logan v. U. S.*, 144 U. S. 263, 283.

²⁶ *U. S. v. Klein*, 13 Wall. 128.

²⁷ *Ex parte Wells*, 18 How. 307.

it precludes remission of fines by courts,²⁸ and precludes indefinite suspension of sentence by courts, although the suspension in this case was not under statutory authority.²⁹ On the other hand, the pardoning power does not preclude the remission of fines by the Secretary of the Treasury under an act of Congress,³⁰ and Congress can enact regulations for the exercise of the pardoning power,³¹ and acts of Congress authorizing deductions from prisoners' sentences for good conduct (good time statutes) have been upheld.³²

To quote from the opinion of the United States Supreme Court in *The Laura*:³³

"Is that power (of the President to pardon) exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution."

The general trend of the decisions has been to grant the president the fullest possible exercise of the pardoning power but not to arrogate to the president everything which can conceivably be thought of as a pardon or approaching a pardon, or, in other words, not to interfere with legislative acts on the ground that they infringe on the pardoning power unless such acts are quite clearly pardons and nothing else. This trend of the decisions indicates that a federal parole law will not be held to infringe on the pardoning power.

The United States Supreme Court has upheld specifically two state parole laws—that of Illinois in *Dreyer v. Illinois*,³⁴ and that of Michigan in *Ughbanks v. Armstrong*,³⁵—but in both cases the point decided is that a state parole law does not violate the 14th amendment of the Federal

²⁸ *In re Mullee*, Fed. Cas. No. 9911.

²⁹ *U. S. v. Wilson*, 46 Fed. 748.

³⁰ *The Laura*, 114 U. S. 411.

³¹ *Ex parte William Wells*, 18 How. 307.

³² *In re Willis*, 83 Fed. 148.

³³ 114 U. S. 411, 414.

³⁴ 187 U. S. 71.

³⁵ 208 U. S. 481.

constitution and in both cases the Supreme Court declines to review the state court's decision that the parole law in question did not violate the state constitution by infringing on the judicial or executive powers.

Reasoning both from the analogy of state parole laws and the general trend of federal decisions on the president's pardoning power the probabilities are that the federal parole law supported, as it is, by public policy, will be held constitutional.

The parole law passed by Congress is remarkably well drawn and seems to try to forestall all possible constitutional objections. In the first place, it is expressly declared in section 3 that the prisoner is to remain "in the legal custody and under the control of the warden . . . until the expiration of the term specified in the sentence" and secondly, section 10 declares that "nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon."

Other noteworthy features of the bill, though not so directly bearing on its constitutionality, are the composition of the board of parole and the approval of the board's findings.

The board is composed of the warden who is well acquainted with the character of the prisoner, the prison physician who is qualified to pass on his physical and mental fitness to live outside the prison walls, and the superintendent of prisons of the Department of Justice who will presumably be an expert in criminology and able to give the board the advantage of a more general viewpoint.

The approval of the attorney-general—who may perhaps be considered to represent the executive—is a prerequisite to all releases.

The law provides that a warden may issue his warrant for the retaking of a prisoner on suspicion and that "any officer of said prison or any federal officer authorized to serve criminal process within the United States . . . is required to execute such warrant." This seeks to

answer, in theory at least, the doubt expressed by Attorney-General William Wirt in 1 Op. Atty. Gen. 220 (1820) and by Attorney-General Benjamin F. Butler in Op. Atty. Gen. 1034 (1836),³⁶ as to the ability of the Federal government to enforce conditions imposed on a release (the point involved in those opinions was of course a conditional pardon and not a parole)—in fact also, the machinery will probably prove complete enough since we have the authority of the present attorney-general for the statement that “there is no reason why the United States should be behind the states” in the adoption of a parole law.³⁷

Assuming for a moment that this statute should be held unconstitutional—in that event, the attempt certainly ought to be made to amend the constitution, as the Michigan constitution was amended, though Federal amendments seem to be getting more and more difficult, for the benefit of a federal parole law—both as a national law and as an example to the states which so far have not adopted one—is very great. The parole system has worked well almost everywhere it has been tried and is supported by the leading penologists and by the American Bar Association Committee on Parole, etc., 1899.³⁸ It seems most logical from the modern viewpoint of crime as a disease preventable and remediable in part; its value both as a curative treatment for the prisoners and as an immediate economic gain to the State—in saving the cost of the prisoners’ maintenance and in the addition of their productive labor to the community—is well established, and in the present stage of development of criminal law and criminology it is at least an invaluable experiment. Moreover, a federal parole system will lessen the pardon business of the president—a work for which he has little time and comparatively poor facilities.

Parole systems will doubtless inevitably lead in time to real indeterminate sentences under which the prisoner may

³⁶ H. R. Doc. 123, 26 Cong., 2d Sess.

³⁷ Atty. Gen.’s Report for 1909, p. 28.

³⁸ Senate Doc. 159, 55th Cong., 3d Sess.

be detained as long as he is unfit for liberty, and here may arise new constitutional questions, for while a release from an indeterminate sentence seems clearly only a change in the place of serving a sentence and does not approach a conditional pardon as nearly as the release on parole under a definite sentence does, yet the feature of ultimate release or final discharge resting with a board seems to infringe more on the judicial power.

It is of course quite possible that our Federal constitution, as well as many of our state constitutions, will have to be changed ultimately, as the advancing ideas of the penologists are expressed in statutes. In perhaps no other field has there been a greater change of ideas since the constitution was framed and to keep the laws inspired by this change permanently within the letter of the constitution may prove too great a task of construction.

In conclusion, it is to be hoped that the question of the constitutionality of the federal parole law will soon be brought to the Supreme Court. Mere acquiescence of all concerned is not satisfactory in regard to a question on which there has been such real difference of opinion among learned judges.

A. K. McNAMARA.

WASHINGTON, D. C.

CURRENT TOPICS AND NOTES.

OUR CONTRIBUTORS.—RICHARD HENRY JESSE, the writer of his *Reminiscences of Chief Justice White*, is a native of Virginia, an educator of national reputation and a graduate of the University of Virginia. He had been for some years the dean of the academic department of the Universities of Louisiana and Tulane, when in 1891 he became president of the University of Missouri. When he retired under the Carnegie Foundation in 1908, he had raised that institution from a minor college of small fame to the front rank of American State Universities. He has the honorary degree of LL.D. from several universities and colleges, was a member of the Administrative Board of the Congress of Arts and Science at the Louisiana Purchase Exposition at St. Louis where he was awarded a commemorative diploma and medal "in recognition of distinguished services to education."

GEORGE WHITELOCK, the author of "Four Uniform Commercial Acts," was born in Baltimore, Md., in 1854 and has practiced law in that city since 1876. He has been president of the Maryland State Bar Association and is the present Secretary of the American Bar Association and a member of the Commission on Uniform State Laws from Maryland. Besides being a busy lawyer he has made many public addresses and written many papers on literary and legal subjects.

EDWARD J. McDERMOTT, the author of "Delays and Reversals on Technical Grounds in Criminal and Civil Cases," is engaged in the practice of his profession in his native city of Louisville. Of Irish lineage he was sent by his parents to the old land while young, where he was a student at Queen's College at Belfast, Ireland, and in the University of Gottingen in Germany. Returning to America, he was graduated from the Harvard Law School in 1876 and in the same year he began the practice of his profession. In 1880 he was elected to the state legislature. He was president of the Kentucky State Bar Association in 1901 and 1907, and president of the Louisville Bar Association in 1905. He has twice declined judicial office. At the meeting of the American Political

Science Association at St. Louis in December, 1910, Mr. McDermott read the paper which is published in this issue.

CHARLES A. WILLARD, the writer of "Cases and Suits Arising Under the Federal Laws," after practicing law for many years at St. Paul and Minneapolis became an Associate Justice of the Supreme Court of the Phillippine Islands in 1901 and in 1909 was appointed United States District Judge of Minnesota. He is a lecturer on the Law of Bailments in the University of Minnesota Law School, and while on the bench at Manila he published a work entitled "Notes to the Spanish Civil Code."

MISS AGNES K. MCNAMARA, the author of "The Constitutionality of the Federal Parole Law," is a member of the New York bar and of the United States Supreme Court bar. She was graduated from the Cornell Law School in 1904; practiced in Binghamton, N. Y., for a short time; was law examiner for the New York State Board of Statutory Consolidation during 1905 and 1906; assisted in the preparation in the law library of Congress, of Volume I of Scott and Beaman's "Index-Analysis of the Federal Statutes" from 1907 to 1909; and since 1909, has had charge of the preparation of Volume II of the same work.

THE AMERICAN SOCIETY OF INTERNATIONAL LAW.—The fifth annual meeting of the American Society of International Law was held at Washington on April 27, 28 and 29th. The president, Senator Elihu Root, in his opening address pointed out the danger of injustice arising from the fact there is no codification of international law and no body with power to establish such a codification. By illustrating abuses that arise even where there is no question as to the law fitting the case, he showed that the possibility of abuse of power in international affairs is infinitely greater. He advocated a general agreement among nations as to certain definite principles.

The topic of discussion and consideration at this year's meeting was the status of aliens, their admission and restriction upon their admission, and papers were read upon the position of the alien in international law, the principles governing national legislation against aliens, the right of the alien to participate in the political, social and economic life of the community; the rights and remedies of aliens in national courts; the right of a government to impose burdens and limitations upon the alien for governmental purposes, that is, for the benefit of the community as a whole; the expulsion of aliens and the effect of the most favored nation clause upon their status. At the banquet which closed the session the

speakers were President Taft, Ambassador Bryce, of Great Britain; Ambassador Uchida, of Japan; Senator La Fontaine, of Belgium, and Sir Charles Fitzpatrick, chief justice of Canada.

The American Society of International Law was organized in 1906. Its object is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. The society has nine hundred members, from all parts of the world, principally persons in the diplomatic and consular service of the United States and other countries, international lawyers, students and teachers of international law and persons interested generally in international affairs.

LAW SCHOOLS AND STANDARDS OF GENERAL EDUCATION.—The report of the United States Bureau of Education for 1910 shows a considerable increase in the number of students in American law schools. But it also shows that legal education still lags behind medical education. Half of the medical schools of the country require one or two years in college for admission; the medical course covers four years and a large percentage of medical graduates take a post-graduate course of a year or two in a hospital. With the exception of a dozen law schools of universities—and the law school of the University of Missouri is one of these twelve¹—the highest standard of admission is a high school course, and while the medical schools almost without exception require four years of attendance, one quarter of the law schools require only two years for a degree, and two, only one year. This, the report says, explains why there was a decrease of 5,555 in medical students in these schools from 1904 to 1910 and an increase of 5,261 in the law schools. The law schools which have courses of only one year or two years express much dissatisfaction with the requirement, but state that it is impossible for them to require longer courses while the door of admission to the bar itself is wide

¹ Beginning with the school year 1911-12, the entrance requirement in Western Reserve University, Franklin T. Backus School of Law, will be the degree of A. B. or B. S.; University of Minnesota college of law, two years of college work; University of Missouri school of law, two years of college work; University of California, Hastings College of Law, one year of college work; University of Illinois college of law, one year of college work; University of Kentucky college of law, one year of college work; Cornell University college of law (for three years' course), one year of college work; University

of Nebraska college of law, one year of college work. Beginning with the school year 1912-13, the entrance requirements in University of California, Hastings College of Law, will be two years of college work; University of Colorado department of law, Colorado Law School, two years of college work; University of Denver Law School, one year college work; University of Kansas school of law, one year of college work; University of Michigan department of law, one year of college work. Since 1897 Harvard Law School has required an academic degree for admission.

open. In those States which have established state boards of law examiners there is no difficulty in requiring full courses in law, but in States which still adhere to the method of examinations in open court or by a special committee for individual applicants law schools are powerless to raise the standard of legal education.

LAW SCHOOLS AND LEGAL AID.—The University of Denver school of law, Colorado, has a department denominated a Legal Aid Dispensary. Work in it by the students is compulsory. Meritorious cases of persons who are unable to pay the fee ordinarily charged by attorneys are taken, and, under the direction of an experienced attorney and with the advice of members of the faculty, the students of the second and third year classes conduct the litigation. An act of the general assembly of the State of Colorado (Chap. 183, 1909) permits students when acting for the dispensary, to appear in all courts of the State to the same extent as if admitted to the bar, and the volume of business now in the dispensary is great enough to afford each student an opportunity frequently to represent clients in the courts. In the school of law of Northwestern University, Chicago, twenty students of the first, second, or third year classes are to be assigned for practical office and trial work as assistants in the Chicago Legal Aid Society, university branch. The number of hours of work from each student is to be determined by agreement with the superintendent of the society.

THE HAGUE COURT OF INTERNATIONAL ARBITRATION—THE SAVAKAR AWARD.—A noteworthy case, involving as it does, the rights of asylum and of national sovereignty has just been decided by the international tribunal. During the last summer an East Indian student named Savakar who was charged with complicity in the murder of an English government official in India and with attempting to wage war on the king, was apprehended in London, and being arrested under the fugitive offenders' act was ordered by the Court to be deported to India for trial. He was placed in custody on board a British liner sailing for India, which touched at the port of Marseilles on its journey. While the vessel lay in the harbor Savarkar escaped through the port-hole of a bathroom and swam to the shore. He was very soon after taken up by the French police who at the request of the officers in charge of him, put him back on the ship, and he was taken to India, tried, found guilty and sentenced to life imprisonment. On learning of the incident the French government claimed that, having touched French soil he ought not to have been restored to British custody until his extradition had been granted; and that, as the offence with which he is charged was political, he would not have been liable to surrender. The two powers, after considerable diplomatic negotiation, agreed that

the determination of the legality of his arrest on French soil should be submitted to the International Arbitration Tribunal at The Hague, and that the sentence should not be carried out till the decision of that tribunal was given.

The tribunal of five judges (of whom three were appointed by other nations, and two by the powers concerned) has upheld the British contention. The court found that the French police had notice of the presence of Savakar in the port of Marseilles; that they had undertaken to guard against attempts to rescue him; that the French police voluntarily handed him over as soon as he was captured to the English officers; that this action was not in any way disclaimed by the superior French authorities at the time; that all who took part in the matter acted in absolute good faith; and that, therefore, there was nothing in the way of violation of French sovereignty. There was a formal irregularity in handing over an escaped prisoner to the officers of a foreign power without a warrant of the territorial sovereign. In strict law, the moment that the fugitive had set foot on the soil of France the English warrant became of no effect, and she was entitled to have his case considered by her own judicial authorities. The International Court, however, held that there is no rule of international law imposing, *in circumstances such as those which have been set out above*, any obligation on the power, which has in its actual custody a prisoner, to restore him because of a mistake in delivering him up committed by the agent of a foreign power. As pointed out by the English Law Journal the words italicised are important; it is only where the parties have all acted in good faith that the delivery up of a fugitive prisoner by a country to which he has escaped without formal extradition would stop that country from recovering him. In a case where the agents of a foreign power should induce the authorities of another, either fraudulently or collusively, to hand over a political refugee, the principles of international law would entitle the latter to demand his return.

THE COURT OF APPEALS OF NEW YORK, reversing the decision of the intermediate Supreme Court, has declared unconstitutional the employers' liability act of that state, which provides that in certain occupations of a specially dangerous character an employe injured in the service shall be entitled to compensation from the employer according to a prescribed scale of damages.² The court describes the statute as "revolutionary," and holds that to make an employer liable in damages to an employe where he has been guilty of no negligence is a taking of property without due process

² *Ives v. R. Co.*, 94 N. E. 431. For the decision of the Supreme Court see 44 Am. L. Rev. 914.

of law and unconstitutional. The opinion is a lengthy one and will receive much attention from the profession in all the states, as it is the first decision rendered by any court of last resort in America upon the constitutionality of an employers' liability act of this kind.

Mr. P. T. Sherman, of New York, the chairman of a committee of that state which has given much attention to industrial accidents and their prevention, criticises the decision as follows:

"The decision of the Court of Appeals recently handed down declares the Wainwright compensation law unconstitutional as in violation of the due process of law clause of the Constitution of the State of New York. The opinion, however, goes further—very much further, and holds that the substance of the law of negligence as between master and servant, which prevails in this state, is practically fixed by the due process of law of the State Constitution and cannot be changed except by a constitutional amendment; so that practically there is no way of having any kind of a compulsory compensation law in this state except by amending the State Constitution, unless the Court of Appeals at some future time should change its opinion.

"That decision can be avoided by taking the New Jersey form of a compensation bill which provides that a contract shall be presumed, between each employer and each employe, to substitute the liability for compensation in place of the liability for negligence, unless a written contract to the contrary is made. There is some doubt about the constitutionality of that also, but I do not believe that it is serious. I think that that would be a way around the difficulty, but it does not cover the subject quite as satisfactorily as a compulsory compensation law.

"Another way is to amend the Constitution of the State of New York. It would require about three years to amend the constitution of this state. It has been frequently done, and ordinarily it is not objectionable, because there is a good deal in the constitution that is not really of vital importance. But in this particular case there is the objection that in order to validate such a law here we would have to amend the due process of law clause of the Bill of Rights in the constitution; and that would make an exception that would open the door to all sorts of other exceptions, to a constitutional provision of vital importance. So it is a dangerous precedent to advocate an amendment to the constitution in that particular respect.

"Moreover, such an amendment would be ineffective if the Supreme Court of the United States should follow the opinion of the New York Court of Appeals and hold the compensation law to be in violation of the 'due process of law' clause in the Federal Constitution.

"Now, as to the rest of the country, I do not believe that the decision of the New York Court of Appeals—while it will, of course, have great influence—will be treated as very authoritative. In the first place, on several points it runs counter to a strong line of decisions by the United States Supreme Court, wherein the United States Supreme Court has construed the same clause in the Constitution of the United States. And, in the second place, it has been the history of labor legislation in this country, that often when a new line of legislation is enacted, the first court that gets hold of it declares it to be in violation of 'due process of law,' and then after a while that legislation becomes established in some other state, and then becomes established generally, and finally the court that at first condemned it has had to reverse itself. Thus the Supreme Court of Illinois has recently had to reverse itself on the constitutionality of the law regulating the hours of labor of women in

factories. And that is the history of quite a number of modern legislative changes in the law.

"I still believe that the great difficulty we are laboring under in advocating a compensation law is the fact that the courts do not understand the subject matter. The compensation law before the New York court was defended almost entirely upon the ground that it was a very good social measure—that it was for the public welfare; but the court holds that, never mind how beneficial it may be to the public welfare, because it is not a rule of justice between the employer and employe, it is not due process of law.

"From my studies of the subject I am led to believe very strongly that the compensation law is a rule of justice between employer and employe,—that it is a much more just rule than the existing law. I think that practice and experience abroad sustain that idea. And I think that when the courts understand the compensation law, when they come to understand the theories upon which it is based as a rule of justice—as a rule of private right between the parties directly affected—they will grow more and more to appreciate it. Consequently I think that the attitude of the Civic Federation at the present time should be that it has presented a measure which its members believe to be just and socially beneficial, that they cannot guarantee its constitutionality but must leave that question for each state department or commission to work out as to it seems best. But I believe that we should offer the suggestion that the New Jersey method is a way of avoiding this difficulty."

THE BAKER A PUBLIC SERVANT.—The Supreme Court of Kansas classes the baker as among those employments, like the common carrier and the innkeeper, whose services the public must have, and whose business is subject to public regulation and control. In this the court is certainly right historically, though in modern times the question has rarely presented itself. In the case in question, the constitutionality of a state statute was contested which established a standard weight for a loaf of bread and prohibited the sale of bread except by the whole, half or quarter loaf. In sustaining the act the court said that it is a matter of common knowledge that the bakery is an institution quite indispensable to every city and town. Practically every housewife is compelled to resort to it on frequent occasions, and many constantly depend upon it for that most necessary article of food, bread. Bread is sold by the loaf. The size of a loaf is fairly well established by trade custom, and the price is generally a common price per loaf of the popularly understood size. There are among us today persons like those who in the time of Amos made the ephah small and the shekel great and falsified the balances by deceit. Some of them make and deal in bread, and by shrinking the size of their loaves or by other devices they cheat the uncritical and unsuspecting public, which relies upon the prevailing customs. The legislature found such practices to be sufficiently extensive in this state to need correcting. Therefore every condition essential to a valid exercise of the police power exists.

"The regulations were designed to reach, and do reach, the very evil to be remedied. Price is unregulated. That will regulate itself. But, if a child be sent to the bakery for a loaf of bread, it will return with a loaf of bread. If fraud were to be circumvented at all, it was necessary that the measures taken should be effective; but the regulations adopted are in no sense harsh or oppressive. Rye bread, corn bread, fancy bread, and rolls of the usual size are not within the statute. Loaves of bread may be in three sizes, certainly enough to satisfy the demands of any trade. Unavoidable variations in size are not taken into account, and with those out of consideration the loss to any honest baker from mishaps resulting in unsalable short-weight loaves will be infinitesimal. To allow short-weight loaves to be sold would lead to the baking of short-weight and odd-weight loaves for a purpose, and would open the door to the very practices which the legislature sought to thwart."³

GROWTH OF THE INJUNCTION BY ACCRETION.—The use of the injunction in recent years and its application to disputes between employes and employers has given rise to much criticism, and its extended application has been sought to be limited by legislation, to which the president of the United States, in one of his messages gives his approval. A dissenting judge in a late case in Ohio where the majority of the court granted an injunction against a labor union that had boycotted a hotel because of its retention of servants not in good standing in the union, restraining it from distributing cards warning the public not to patronize the place and threatening to publish the names of any who did so, gives a new view of the growth of the injunction remedy in the past two decades. It has come about by "accretion," he says, which the Supreme Court of the United States defined in a dispute between two states as to the boundary line which was marked by a shifting river, as something which you can see has taken place but which you can not see take place. "If," he says,

"some of the courts which have issued injunctions in labor troubles were inquired of as to the source of their power to go to the lengths they have gone in some cases in restraining, by injunction, breaches of the peace and violations of the criminal law generally, they might be compelled to answer 'we got it by accretion, by the gradual wearing away of the power of the executive branch of the government as aided by the regular criminal courts, and a corresponding increase in power, by accretion, on the part of courts of equity, to substitute the injunction for the neglect of duty on the part of executive officers and in the place of jury trials in the regular criminal courts.' They might add 'Of course no one saw us get this power, but all now know that the ancient boundary lines have shifted and that we are now exercising the power.'"⁴

³ State v. McCool, 111 Pac. 478.

⁴ McCormick v. Local Unions, 32 O. C. C. 165.

GAS COMPANIES—REGULATION OF CHARGES.—In the Federal Court in Nebraska in a suit in equity by a gas and electric light company to enjoin the enforcement of a city ordinance fixing a maximum price to be charged for gas, on the ground that it is confiscatory and unconstitutional, several important rulings are made. The court holds first that in determining the value of complainant's property on which it has a right to earn a fair return it is not entitled to any allowance for the value of its franchise to use the streets, where such franchise was granted by the city without compensation.

In the next place it rules that in fixing the value of property on which it is entitled to earn an income, for the purpose of determining the reasonableness of the rates prescribed, the amount of outstanding stock and bonds of the company should not be considered where it is shown that such amount is several times the cost or present value of its property. And that where its net earnings under a rate prescribed by ordinance, based on the quantity of gas sold during the preceding year would be sufficient to give a return of over 5 per cent on the value of its plant, the effect of such ordinance cannot be held confiscatory before an actual trial to determine whether the reduction made in the rate will not result in increased consumption and net earnings. And finally that rates fixed by a municipality under which the total income earned by the gas company will be sufficient to pay a reasonable return on its investment are not confiscatory because the furnishing of gas to some small consumers under such rate would be at a loss.⁵

NUISANCE—SANITARIUM IN RESIDENCE DISTRICT.—The Supreme Court of Washington decides that the maintenance in a residential district of a city of a sanitarium for the treatment of tuberculosis patients is a nuisance, where the fear induced by the proximity of the sanitarium disturbs the "comfortable enjoyment" of adjacent property, whether the fear is founded on scientific facts or not, for "comfortable enjoyment" means mental quiet as well as physical comfort, and the word "comfort" implies whatever is requisite to give security from want and furnish reasonable physical, mental and spiritual enjoyment.

To constitute a nuisance, there must be more than a tendency to injure, and there must be something appreciable, tangible, actual, or subsisting, and, in determining whether an injury charged comes within these general terms, regard must be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities, and the nuisance and dis-

⁵ *Lincoln Gas Co. v. Lincoln*, 182 Fed. 926.

comfort must affect the ordinary comfort of existence as understood by the people.^o

THE PRESUMPTION OF INNOCENCE.—In the English House of Commons, a few weeks ago a labor member asked the prime minister if his attention had been called to a case in the country where a man **had been charged** with an offense against a girl, and the judge in charging the grand jury had told them that when they heard the evidence they would have no doubt that the girl was not only a consenting but probably an inciting party. Mr. Churchill, the home secretary, in replying for the prime minister said that he had looked into the case and found that the grand jury had, notwithstanding the charge, found a true bill, but that the jury had acquitted the prisoner. Whereupon the labor member proceeded, in his ignorance of law, to dig a pit and forthwith fall into it. "Is it," said he, "in accordance with the law for the judge to assume the innocence of a prisoner before the evidence has been heard?" Mr. Churchill: "It is not only the practice but it is a most ancient tradition."

SLANDER—MUTUAL OPPROBRIOUS EPITHETS.—Does the modern novelist know what an unexplored field the modern law reports are? Do any of our short story writers give a more vivid picture of a neighborhood quarrel in low life than is shown in the opinion of the Supreme Court of Louisiana, in the action for slander of *Gilardino v. Patorno*?^{*} The parties are evidently of foreign extraction and it appears that Patorno owns a house, some of the windows of which open upon the yard of another house, owned and occupied by Mrs. Gilardino's mother, where Mrs. Gilardino, with her husband and children, and other tenants also, reside. The windows had been closed by planks nailed across them from the outside, and one day in June Mrs. Taoramina, a tenant occupying a room in Patorno's house, asked him if he would have the planks removed from her window, and he spoke to Mrs. Gilardino's husband on the subject, and received a reply to the effect that he (Gilardino) did not control the matter, but that if Patorno should remove the planks he thought there would be no trouble about it. The planks were accordingly removed, either by Patorno or Mrs. Taoramina. On the same day, or the next, however, Mrs. Gilardino ascended a ladder and nailed them back again, the pleadings of Mrs. Taoramina to the contrary notwithstanding, and Mrs. Taoramina told Patorno what had been done. Patorno thereupon again spoke to Gilardino; but he, think-

^{*} *Everett v. Paschall*, 111 Pac. 879.

[†] 53 South. 556.

ing that Patorno was mistaken in supposing that the planks had been replaced, invited him to come into the yard and see for himself, which Patorno did, and, finding that the planks had been replaced, began a conversation with Gilardino on the subject. Thereupon Mrs. Gilardino, who had been upstairs, came down into the yard and the trouble began. Here is Mrs. Gilardino's version of it:

"Mr. Patorno entered inside, and he addressed my husband, and he says: 'Is this the thanks you are giving me?' My husband politely answered and says: 'Mr. Patorno, I have got nothing to do with this.' And then he addressed me—I was standing at the foot of the stairs when he addressed himself to me—and he says: 'What, you dirty villain; you are cruel. You have nailed up the planks to the window.' He turned around and says: ' . . . ' (here the witness attributes a very ugly epithet to defendant). And in that manner I turned around and ordered him out of the house, and when he was going through the alley he said the same words, and when he got in front, on the banquette, he called me ' . . . ' (another epithet, uglier, if possible, than the first). Q. Well; did he speak loud? A. Yes, sir; you could hear him a mile distant. . . . Q. Did you say anything, or use any bad language, to Mr. Patorno, when he said that? A. No, sir. Q. Did you call Patorno 'ladro'? A. Well, outside, when he got me so angry, by using the words that he used to me. . . . Q. Did you call him ' . . . ' (a very bad name, indeed? A. After the question he answered me, I did! after the words he used. . . ."

And this is the way it appeared to Patorno, as he told it on the witness stand:

"I walked in, and I found, in the middle of the yard, Mr. Gilardino, waiting for me. He was by himself, and I addressed him. Says I: 'There it is. There is the planks on that window. What right your wife has to go up there and nail those planks on the frame of my window?' Mrs. Gilardino was not present, but she came from upstairs, and started at me; says: Yes; you ' . . . ' (epithet reflecting not only on defendant's personal character, but upon his ancestors as well), 'I done it.' We started to curse each other. I wanted to get out of her way, because I didn't want her to hit me; but she got hold of a chair, and the best thing I could do was to retreat until I got to the banquette, and she was facing me, and we were exchanging all those bad words that have been recited in the case."

The Supreme Court disposes of the case in a brief judgment of one sentence only: "An action in damages for slander, insult and abuse will not be maintained where it appears to have been a case of mutual interchange of opprobrious epithets."

DUTY OF GAS COMPANY TOWARDS CUSTOMER—INJURY THROUGH ESCAPING GAS.—In a recent case in the federal court,⁸ the owner and occupant of a house in Memphis, who rented rooms to lodgers, having discovered that gas was escaping in the house, telephoned early in the day to the gas company, stating the facts and asking that some one be sent at once, which was

⁸ *Memphis Gas Co. v. Creighton*, 183 F. 552.

promised, but no one came until 2 o'clock in the afternoon. In the meantime, about noon, the owner, in attempting to find the leak, lighted a match, which caused a explosion of gas accumulated inside of a partition where there was a defect in a pipe which caused the leak. The explosion injured a lodger who sued the company for damages. The latter denied liability on the ground that they owed the plaintiff no duty to cut off the gas from the house and that the act of the landlady in lighting the match was the proximate cause of the injury. But as to the first point the court ruled that when the company was notified of the danger to the inmates of the house, it owed a duty to everyone within the sphere of the danger to remove it with promptness and diligence; that it was not material that another person owned the premises, for it, the gas company, had the control of the letting the gas into the house. And on the second defense, the court said:

"It is claimed that the proximate cause of the injury was the act of Mrs. B. in bringing the lighted match into contact with the gas. This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable.

"If the act of one be not negligent when tested by rules of law, a priori, must that one be liable whose culpable negligence has led directly to the injury without the intervention of any unlawful act. Whether Mrs. B. was guilty of an inexcusable negligence in her use of the lighted match would be a question of fact with which we do not propose to deal. For the present purpose it is immaterial. It would be a profitless task if we should undertake to expound the general doctrines of proximate causes, or to canvass the great number of cases which the industry of counsel has collected in their brief. One point, however, we think it proper to notice. It is contended that it could not have been foreseen as probable that a lighted match would be put near the gas, and that therefore the defendant would not be liable for an accident caused thereby. There are many cases in which such language has been employed, but incorrectly as we think. If the thing done produces immediate danger of injury, it is not necessary that the author of it should have in mind all the particular results which might happen from the presence of the danger. The third proposition is, in substance, that the result would have been the same if a lighted match had been applied, as was done by Mrs. B., before the time when the defendant became negligent. Perhaps, but only perhaps. The accumulation of gas was constantly increasing, and an explosion at an earlier time might not have been so serious as to have caused the injury complained of. The proposition itself is a matter of speculation, and without value in determining the result of the actual conditions in which the injury happened.

"The fourth proposition is in substance only a repetition of the second, couched in different phraseology. The fact that the defendant was in contractual relations with Mrs. B. only does not relieve the defendant from the consequence of its wrongful conduct suffered by an inmate of the house rightfully there and within the range of the danger which the defendant produced."

THE JUDGE'S OPINION ON THE FACTS IN A TRIAL IN THE FEDERAL COURT.—In a case in the Federal Court in Virginia, McDowell, J., gives a very able and interesting summary of the practice in the federal courts of the trial judge expressing his opinion to the jury as to the facts—the old common law and the newer English practice, but absolutely prohibited in many of the state courts. He shows that there is no logical or sound reason why this should not be done after the jury has been some time in consultation, as well as before they retire to consider the verdict, a thing which had been criticised in *Garst v. U. S.*⁹ This criticism, says McDowell, J., “comes from a judge for whose opinion I have such very great respect that I have been led to make a careful re-examination of the available authorities, and now feel it proper to state my reasons for holding the view that the practice is not an improper one.” The judge continues:

“(1) It is quite true that it is not unusual for the trial judge to give to the jury his opinion on the facts at the close of the evidence, and at the same time that he gives to the jury the instructions on the law of the case. I regard this practice as much more objectionable than that of giving the opinion on the facts, when given at all, after the arguments of counsel to the jury have been made. When a federal trial judge deems it his duty to express to the jury his opinion on the facts, it is of first importance that he make the jury understand that, while they are bound by his instructions as to the law, they are not bound by his opinion on the facts; and yet I know of nothing more likely to cause confusion in the minds of the jury on this very point than the practice of combining instructions on the law with an opinion on the facts, and the objection is rarely wholly obviated if both the instructions and opinion are delivered to the jury at the same stage of the cause. Assuredly there is much less probability of confusion if the delivery of the instructions and of the opinion are separated by the arguments of counsel to the jury.

“(2) No trial judge need consider his own judgment infallible. No matter how firmly he may be of opinion, at the close of the evidence, that the jury ought to find for one side or the other, I have long thought it prudent, even if not the right of the side against whom the judge inclines, that the judge at least hear what counsel for that side can say of the facts to the jury before expressing to the jury any opinion on the facts.

“(3) None but a decided opinion on the facts should, in my belief, be expressed to a jury. Unless the judge feels that there is no considerable room for doubt as to the correctness of his views on the facts, it is much the better course to leave the case wholly to the determination of the jury. But to express a decided opinion on the facts in advance of argument to the jury is for the judge to painfully embarrass the counsel for the side against which the judge has expressed his opinion. Counsel not infrequently hold intimate and most friendly relations with the judge, and may entertain, and nearly always desire to show, respect for his opinions. It certainly imposes an unnecessary restraint on counsel under such circumstances to put them in the frequently almost hopeless position of having to combat the opinion of the judge before the jury. It is in my estimation the better practice to have the case argued to the jury by counsel when they do not know what the judge's opinion on the facts is, and when it is yet uncertain that he will express any opinion at all.

⁹ 180 Fed. 339.

"(4) When an opinion on the facts is given, it must be carefully guarded. The jury must be told that they are not bound by it, and that the ultimate decision of the case rests entirely with them. In addition, it is my practice to say to the jury that my opinion on the facts is submitted to them for just what they think it is worth. In consequence, an opinion on the facts is of real assistance to the jury only in so far as it is well reasoned. Whether it is well reasoned or not can certainly be much better judged by the jury after they have heard the arguments of counsel than before.

"Having now indicated briefly some reasons for holding that the opinion on the facts should come after, rather than before, argument of counsel, I reach the more immediate ground of criticism, which is that the trial judge's opinion on the facts in *Garst v. U. S.* was expressed after the jury had been out long enough to indicate the probability of a disagreement. The chief ground of objection is that, at such juncture, the opinion of the judge is likely to have too great influence on the jury.

"(1) I am strongly of the opinion, based on repeated experiences, that the judge's opinion on the facts has vastly more influence if given before the jury have commenced their deliberations than if given after they have expressed to each other their views and have had opportunity to have engaged in earnest (frequently heated) arguments with each other. Members of juries, like other men, are likely to have some pride of opinion. A juror who has expressed no opinion on the case to any one is, it is submitted, much more liable to be influenced by a well-reasoned and cogent opinion on the facts by the trial judge than is the same man after he has committed himself to the opposite theory, and after he has possibly argued and expostulated that his view is the only correct one.

"(2) There is still another reason why in some—indeed, in many—cases the trial judge may well refrain from stating his opinion on the facts at least until the jury has shown an inclination to disagree. It is to me, as it doubtless is to the majority of trial judges, much more satisfactory to have the jury agree upon the proper verdict without any assistance whatever from the judge. Being strongly impressed, as I am, with the belief that in ordinary cases, especially in criminal cases, the combined judgment of the jury on questions of fact is better than my own, I can see very little force in objecting to a practice which at least has the merit of giving the jury an opportunity to bring in a verdict which will be the jury's unassisted conclusion on the facts.

"(3) Considering the numerous terms of court required to be held in this district, and the great expense, both direct and indirect, frequently involved in a final disagreement by a jury, it would seem that the trial judge is, in this district at least, more or less justified in regarding a 'hung jury' as one of the lesser calamities, to be avoided if it properly can be; and if, in seeking in a proper manner and in a proper case to thus avoid mistrials, the trial judge's opinion on the facts exerts some influence on the jurors, I conceive that the fact that it will have influence is the chief reason for the existence of the power to express opinions on the facts.

"(4) 'Mistrials' are sometimes avoided by jurors agreeing to a verdict which is unjustified by the evidence, rather than be kept in confinement in the jury room. Almost innumerable cases are to be found in the books in which a verdict has been set aside as contrary to the weight of evidence. In such cases, if instead of leaving the jury to debate and argue without assistance, the trial judge had after a reasonable interval called the jury into the court room and delivered to them a fair and well-reasoned opinion on the facts, it is not wholly improbable that in some cases at least the erroneous verdict would have been avoided.

"(5) The reason for not expressing an opinion on the facts at an earlier stage of the case, which existed in the *Garst* case, may also exist in some

future cases. In that case the evidence for the government was not introduced in the most effective order, and the argument of the then district attorney was not as cogent as was usual with him. In consequence, both at the conclusion of the evidence and at the conclusion of the arguments, I was not entirely satisfied that the case was of such nature as to demand of me an opinion on the facts. It was only after the opportunity for reflection afforded by the intermission for Sunday that it became entirely clear to me that the case did call for an opinion on the facts, and that it would be an invasion of duty on my part to leave the jury to struggle with the case longer without such an opinion."¹⁰

This view is supported by both the United States Supreme Court and the Circuit Court of Appeals in *Aerheart v. Railroad Co.*,¹¹ *Allis v. S. S.*,¹² and *Simmons v. U. S.*¹³

BANKERS' REPRESENTATIONS AS TO CUSTOMERS' FINANCIAL STANDING.—The duty and liability of a banker who is asked as to the solvency of a customer is discussed at length in a recent English case.¹⁴ The plaintiff, a marine engineer, being desirous of going into business and having been introduced to the managing directors of a company known as Gilletts Limited, who were at that time carrying on the business of motor and general engineers, concluded to invest his money in this company if it was one of good financial standing. Accordingly, he made inquiries through an agent as to its standing and particularly of the defendants, who were the bankers of the Gilletts Limited, and received from the manager of the bank a letter in these words:

"Messrs. Gilletts Limited keep a satisfactory account with us here. They appear to be doing a genuine and increasing business, and their two managing directors are experienced men in their business. The firm was reconstructed about six months ago as additional working capital was required. This information is for your private use only, and is given without any responsibility on our part." On the strength of this letter the plaintiff invested over \$5,000 in the business and also lent the company both money and securities. In an action against the bank's manager he alleged that at the time when the defendant's bank manager made the above representation, the Gilletts Limited were not in a satisfactory position as regarded respectability or financial standing, nor were they doing a genuine or increasing business under good management or otherwise, nor had the two managing directors the reputations of experienced men in the business of the company, nor could the company be safely trusted with money or securities, and that the plaintiff had wholly lost the advances and investments before mentioned. The jury found for the plaintiff, but the judgment is set aside by the Court of Appeal, which lays it down that

¹⁰ U. S. v. Foster, 183 F. 626.

¹¹ 99 F. 907, 909.

¹² 155 U. S. 117; 15 S. C. 36.

¹³ Simmons v. U. S. 142 U. S.; 12 S. C. 171.

¹⁴ Parsons v. Barclay Co., 103 L. T. 196.

when information is asked of a banker concerning the financial position of one of his customers it must be shown, in order to render him liable for misrepresentation, that his statement is fraudulent in a legal sense; and it is no part of his duty to make inquiries elsewhere as to the solvency or otherwise of the customer respecting whom the inquiry is made, or to do anything more than answer the question put to him honestly from what he knows from the materials which he has before him.

ILLEGAL CONTRACT AND KNOWLEDGE OF ILLEGAL PURPOSE.—The difference in the American and English law as to illegal contracts is well illustrated in the recent English case of *Upfil v. Wright*.¹⁵ In an action to recover the rent of a flat in London, the defense was that the rooms were leased for an immoral purpose to the knowledge of the plaintiff's agent, and that the contract was therefore illegal and void. On the trial it was proved that when the agent let the flat to the defendant he knew that she was an immoral woman, in that she was the kept mistress of one H., and he also knew that the rent was really to be paid with the money of H. The Court of King's Bench held the rent not recoverable, Darling, J., saying that the case came within the rule that out of a forbidden or immoral cause, no action in the King's court can rise. Bucknell, J., adding that the law will not allow a contract to be enforced where the consideration and the obligation of the parties is tainted with immorality. Such a case stands upon exactly the same footing as if the contract were tainted with illegality.

This decision follows the well-established English rule that mere knowledge of the illegal intention is enough to make the contract void, as in *Pearce v. Brooks*,¹⁶ where coach proprietors were denied recovery of the hire of a carriage which they knew the defendant had engaged for the purpose of carrying on her trade of a prostitute. But Bramwell, B., dissenting in that case thought that though the defendant hired the carriage for an illegal purpose it did not follow that the plaintiffs let it for that purpose. "If a man," said he, "were to ask a dealer for dueling pistols and say 'I think I shall fight a duel tomorrow,' might not the seller answer, 'I will sell you the pistols, but I have nothing to do with your purpose, that is your business, mine is to sell my goods.' " The rule in the United States is in accord with this view and in our courts the mere knowledge of the vendor of property that the buyer means to make illegal use of it is not a defense in an action for the price. In Missouri, in *Michael v. Bacon*,¹⁷ in an action for work, labor and materials in papering and fitting up a house in St. Louis, the defense was that the de-

¹⁵ 103 L. T. 834.

¹⁶ L. R. 1 Ex. 213.

¹⁷ 49 Mo. 474.

fendants intended to use the house when fitted up as a gambling house and that the plaintiff knew that such was their intention. But the court held that this was no bar to the recovery, saying: "I am not aware of any principle of law which compels a merchant, laborer or mechanic to overlook the morals of his customers. He is not the keeper of their morals in any sense of the word. If he sells goods to a gambler, the sale is perfect on delivery, and the gambler must pay for them, whatever his purpose may have been in making the purchase. If the merchant is not to be paid out of the illicit gains of a gambler, and is not connected by contract with the object the gambler has in view, his knowledge of the purpose does not vitiate the sale."

SURETY COMPANY NOT A PUBLIC SERVICE CORPORATION—LIBERTY OF CONTRACT.—The Federal Court in Nebraska rules that the business of a surety company engaged in furnishing bonds, undertakings, etc., is not one affected by any public interest nor a monopoly, but is purely a private business, and a state has no power to prescribe rates to be charged by such corporations. Therefore a Nebraska statute which makes it the duty of certain state officers to fix maximum rates of premium to be charged by all surety companies doing business in the state, foreign or domestic, for furnishing bonds, contracts, recognizances, stipulations and undertakings, makes it a misdemeanor for any officer or agent of any company to charge a higher rate and requires the revocation of the authority of the offending company to do business in the state, is void.¹⁸

The court says that the liberty to enter into contracts is not an unrestricted liberty, but is subject to the police power of the state. The extent to which the state may go, in the exercise of this power, in regulating or prescribing the prices of goods or services is not clearly defined. In earlier days, it was usual for Parliament to fix the rates which lawfully could be charged even by those who were engaged in private business, and such legislation also existed in the colonies before the adoption of our Constitution. The right to regulate the charges for services of those whose business is devoted to a public use has been thoroughly established. It is also well settled that the right exists in the state to regulate the charges to be made by those whose business is affected by a public interest. It has been held that the business conducted by grain elevators is so affected with a public interest that the state may regulate the charges imposed by them. Some of the characteristics of that business which led the court to declare it to be affected with a public interest were: The practical monopoly of the business at the places where it was carried on, and the consequent power to levy

¹⁸ *American Surety Co. v. Shallenberger*, 183 F. 636.

tribute upon the community; its relation to the business of transportation, and to the business of common carriers—thus being of a quasi public character. The business of the companies engaged in furnishing surety bonds has none of these characteristics. It is in no way a monopoly, for individuals and partnerships are free to furnish such bonds in competition with them, and to make any charge or no charge for assuming such risks. No one is compelled to resort to the surety companies. If the state may fix the amount of compensation for which an insurer may lawfully contract for furnishing such insurance, the state may dictate the price for which all other commodities shall be sold, including the price which may be paid for labor. This cannot be done. The fourteenth amendment to the Constitution protects the right of those engaged in purely private business to fix the price at which they will sell their services or commodities.

The statute is on a par with a number of others which have been adjudged unconstitutional, *e. g.*, a federal statute regulating the charges for private telephones in the District of Columbia.¹⁹ A California law limiting the compensation which an employment agent may receive to 10 per cent of a month's wages in the employment furnished.²⁰ An act of the legislature of New York providing that laborers on public works should be paid the prevailing rate of wages.²¹ A statute of Indiana which provided that unskilled labor employed on any public work of the state, counties, cities and towns should receive not less than 20 cents an hour,²² and several others.²³

PRESUMPTION OF COERCION OF WIFE—KEEPING BAWDY HOUSE.
—In Iowa it has just been laid down that the old rule, commented upon in our last issue,²⁴ that a criminal act committed by a married woman in her husband's presence is presumed to be done by his command and under his coercion does not apply in the prosecution of a wife for keeping a house of ill-fame. The court cites with approval the ancient reason given by Hawkins,²⁵ that "this is an offense as to the government of the house in which the wife has the principal share, and also such an offense as may generally be presumed to be managed by the intrigue of her sex."²⁶

¹⁹ *Chesapeake Co. v. Manning*, 186 U. S. 238; 22 S. C. 881.

²⁰ *Ex parte Dickey*, 114 Cal. 234, 77, p. 924.

²¹ *People v. Coler*, 166 N. Y. 1; 59 N. E. 814.

²² *Street v. Varney Co.*, 160 Ind., 338; 66 N. E. 895.

²³ *State v. Associated Press*, 159 Mo. 410; 60 S. W. 91; *State v. Norton*, 5 Ohio N. P. 183; *State v. Firecreek Coal Co.*, 33 W. Va. 188, 10 S. E. 288.

²⁴ *Ante*, p. 283.

²⁵ 1 *Pleas C. C.*, Sec. 12.

²⁶ *State v. Gill*, 129 N. W. 821.

THE VALUE OF A LAWYER'S SPEECH TO THE JURY.—On a trial of a man for violating the prohibitory law of North Dakota, the judge instructed the jury in the following words: "Gentlemen of the jury, I charge you to pay no attention to any remarks or statements made by counsel. You are the sole judges of the questions of fact in this case. The court will give you the law. It is your duty to decide this case according to the law given you by the court." The Supreme Court reverses the conviction, saying: "Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury. If the jury are to disregard the arguments of counsel altogether, if they are to shut their ears to the illustrations, comments, and reasonings, how unmeaning, indeed how absurd, is the appearance of counsel. It is a most valuable right to be represented by learned and eloquent counsel, not only before the court, as to the law, but also before the jury, as to the facts. So far as the facts of a case are concerned, the privilege is valuable, just because the jury may look to the argument of counsel, may consider his reasoning, before making up their verdict. In our opinion it was a dangerous stretch of judicial prerogative by the charge of the court to tell the jury to pay no attention to any remarks or statements made by counsel."²⁷

THE COURTS HEAR THE CALL—CRIMINAL PROCEDURE.—The decision of the Court of Appeals of New York in the recent case of *People v. Nesce*,²⁸ is another illustration to be added to those given in our last issue, of the change in the attitude of some of the appellate judges as to error in criminal cases which the demand for legal reform is already bringing about. In this case a murderer having been duly convicted by a jury was sentenced to be hanged. But the judge omitted to ask the prisoner if he had anything to say why sentence should not be pronounced. On this ground and on this alone the prisoner's counsel sought to have a new trial given him by the Court of Appeals. And he had precedents in his favor. In a case in the same court it had been held that this formula was, in the language of the judge who delivered the opinion, "an essential prerequisite to an adjudication of the guilt of the prisoner." And the judge proceeded to lay down the archaic rule that form and not substance was the main thing to be looked at in the trial of a man for a crime. "It may be that the prisoner has sustained no injury from the non-observance of the law in the present case. But that is not the question for this court. That question is whether the record shows that the prisoner has been convicted of murder in the first degree in the mode prescribed by law. If it does, the judgment should be affirmed and execution done as the law requires. But if the record fails

²⁷ State v. Gutterman, 128 N. W. 308. ²⁸ 94 N. E. 655.

to show that he has been so convicted or that all of the opportunities of showing his innocence given him by law have been given to him by the court, the judgment must be reversed and a new trial had."²⁹ Two judges dissented, but the majority stood by the technical idea and ordered a new trial, and several years later the decision was approved and a new trial granted to another criminal for the same cause.³⁰ But in the Nesce case the Court of Appeals unanimously overruled these decisions, and while it holds that it is an indispensable requirement of the law that no person shall be sentenced to death until he is asked if he has anything to say why sentence shall not be pronounced, it refuses to follow the absurdity of requiring the whole trial to be gone over again because of an omission which took place after the verdict was rendered. It rules that the criminal gets all his rights by the case being sent back to the trial court to have the sentence given again after the prisoner has been duly asked according to law what he has to say against the sentence being pronounced.

A GUEST'S WATCH AND AN INNKEEPER'S LIABILITY.—Statutes in force in a number of the states which seek to lessen the common law liability of the innkeeper provide that as to certain kinds of property, if the innkeeper has a safe and so notifies the guest, the latter cannot complain of a loss if instead of depositing the articles in the safe, he elects to keep them in his room. The statutes do not cover all of the guest's baggage—this would, of course, be absurd; but are limited to money, jewelry and "articles of gold and silver manufacture." In a recent Michigan case the plaintiff sued a hotel keeper for a gold watch and chain, a diamond watch charm and twelve dollars in money, which he placed in his hat on the bureau when he went to bed, but which were gone when he looked for them in the morning. The defendant pleaded the statute. But the Supreme Court holds that the watch and chain are not within the words of the statute.³¹ It is in derogation of the common law and must be strictly construed. Certain property, particularly valuable in itself, taking but small space compared with its value for its safe-keeping, easy of concealment and removal, holding out great temptation to the dishonest, and not necessary to the comfort or convenience of the guest while in his room, is made the subject of the statutory exemption. Property of a different description, including all that which is useful or necessary to the comfort and convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used, and is convenient for use by travelers as well in as out of their rooms, is left, as before the statute, at the risk of the innkeeper.

"It is common knowledge that the most important part of a

²⁹ *Messner v. People*, 45 N. Y. 1.

³⁰ *Weadock v. Swart*, 128 N. W.

³¹ *People v. Faber*, 199 N. Y. 256. 734.

watch, those parts which make it possible to keep time, are neither gold nor silver. If the legislature had intended to include in the statute an article of such general and necessary use as a watch, we think it would have used the word 'watch' instead of saying 'articles of gold and silver manufacture.' "

The conclusion is in accord with previous decisions.³²

LIQUOR LAWS AND THE COURTS.—The various and peculiar liquor laws which many of the state legislatures grind out at every session continue to keep the courts busy in their construction and enforcement.

A Kentucky local option law prohibited a carrier from transporting intoxicating liquor into a local option district, except that individuals may bring in upon their person or as baggage not to exceed one gallon for their own use. The provisions of the act by another section are to apply to common carriers or others who carry freight or goods for hire. In *Com. v. Southern R. C.*,³³ it appeared that a passenger who was in the liquor business came on the defendant's train into a local option district with three or four gallons of whiskey contained in four or five packages. He paid nothing for having the whiskey conveyed, but purchased and used a ticket to his destination. He had no arrangements with the railroad about bringing the whiskey over, did not have the whiskey checked, nor did he say anything to the agent about it. The whiskey belonged to one B., and the passenger was bringing it to the local option town for delivery on an order. A conviction of the railroad under this statute is reversed by the Court of Appeals which holds that as the carrier received nothing for carrying the whiskey, the statute did not apply. If goods are carried for pay then it is the carrier's duty to exercise ordinary care to see that they are not intoxicating liquors. But the statute does not apply where the passenger by virtue of his ticket is entitled to carry personal baggage, and nothing in addition to the purchase price of the ticket is paid for the privilege. It was not the purpose of the act to make of the carrier an inquisitor with full power to examine and inspect the baggage of a passenger so as to determine whether or not he has whiskey concealed in the same.

In a case in Virginia the defendant having been found guilty of entering his saloon on Sunday contrary to the statute, was for the offense fined \$50, sent to jail for six months, his license revoked, and the room itself made outlaw by being declared non-usable as a place for the sale, storage or manufacture of liquors for a year. He asked the Supreme Court to declare that this

³² *Laws, Bail.*, Sec. 81; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728; *Jones v. Hotel Latham Co.*, 115 N. Y. Supp. 1804, and *Kerlin v. Swart*, 143 Mich. 228, 106 N. W.

710; *Contra Lang v. Hotel Co.*, 12 Week. L. B. 250 (Ohio), a decision of an inferior court and of little authority.

³³ 132 S. W. 408

was a "cruel and unusual" punishment which the Constitution prohibited, or at least that it was not a penalty proportioned to the character and degree of the offence which the Constitution prescribed. But the court thought that the provision in the Constitution against "cruel and unusual" punishment was aimed at the ancient barbarous punishments, like drawing, quartering, burning at the stake, cutting off the nose, arms, or limbs, starving to death, or such as were inflicted by the act of Parliament of 22 Henry VIII, whereby the prisoner was ordered to be thrown into boiling water and boiled to death for poisoning. And as to the other provision which did not refer to the mode but rather to the degree and extent of the punishment the court said that

"fines so excessive, imprisonment so long, looking to the offense, as to shock our feelings of humanity, conscience, justice, and mercy would be branded by this clause. I suppose that a sentence for year to the penitentiary for assault and battery attended with no serious results, or long imprisonment in jail for profane swearing, would fall under that clause. But it is established everywhere that the legislature has large discretion as to punishment in kind and degree. Can we say that this act which fixes punishment at a fine of from \$50 to \$250 and imprisonment from six months to one year is so disproportionate to the offense as to be unconstitutional? Counsel says that it is unusual and severe and drastic. Drastic and severe it is, but not beyond the scope of legislative authority."

But the court thought that the law might be unconstitutional "on the theory that it violates constitutional law in prohibiting to the citizen his use of his property for innocent purposes. It says that he shall not enter the saloon for innocent purpose, to sleep, to cook his meals, to secure his money from theft forgotten in his drawer, to preserve his property from leakage of water pipes, or from fire. It seems questionable to me in this respect, though not urged by counsel. The statute absolutely prohibits any use of the room or place. Whether entrance from stringent necessity would be excused by the incorporation of an exception by the courts we do not say. Cases differ as to this. Perhaps it would be like the case of some ancient statute or law which forbade the drawing of blood, but which was held not to apply to the surgeon or physician drawing blood to save life. This statute makes no express exception."²⁴

The Iowa liquor law attempts to prohibit any person in the state from getting any liquor from outside. It cannot do this so far as bringing it into one state from another is concerned, for the Supreme Court has decided that a state has no power to deprive its citizens or residents from importing what it pleases from another state—this is interstate commerce, over which the national and not the state government has jurisdiction. But a state statute is in force which provides that if any common carrier or person, or any one as agent or employe thereof, shall transport to any person within the state any intoxicating liquors without first being furnished with a certificate that the consignee is the holder of a permit to sell intoxicating liquors in the county to which the

²⁴State v. Woodward, 69 S. E. 386, W. Va.

shipment is made, such carrier or person shall be fined. The object of this is to prevent anyone from carrying the obnoxious goods from the station to the house of the purchaser. The Supreme Court rules that the word "person," as used in the statute, means a public or private carrier, and does not include one who transported several interstate shipments of liquor from the railroad company's depot to the consignee's place of residence as a mere gratuity.³⁵

A rather odd effect of a local option liquor law is seen in a recent Texas case. The plaintiff alleged that the defendant had induced him to purchase a preparation called "Hiawatha," under the false representation that it was not an intoxicating drink, and thereafter on selling the same he was convicted and fined for selling intoxicating liquor in violation of law. He asked as damages his costs and expenses in the criminal prosecution and likewise compensation for mental anguish. But the Court of Appeals decides against him.³⁶

The result seems to be brought about through the application of the rule that there shall be no contribution between wrongdoers. In *Cumpston v. Lambert*,^{36a} a justice of the peace called upon a person to assist a constable in making an arrest on a *capias*, stating that such arrest was legal, and promising to indemnify such person for assisting to make the arrest; but it turned out that the arrest was illegal, and judgment was obtained against the party assisting for assault, who then brought suit. It was held the indemnity was illegal for the reason that it was based on an agreement to commit an assault on another. In the case of *Pierson v. Thompson*,^{36b} it was decided that a servant cannot sustain an action on a bond of indemnity by his employer for the damages he has sustained by being compelled in a civil action to pay for an assault and battery he has committed. There the employe, in the management of a ferry, and while thus acting, and, as he supposed, in the discharge of his duty, used some violence towards two individuals in ejecting them from the boat. The Texas court concludes that the principle involved is that it is against public policy to allow redress for any agreement or act in violation of law. To refuse such character of damages on a contract of indemnity because against public policy, and to allow the recovery of such character of damages because founded on deceit, is merely to change the form of the action, and by such indirection to nullify the principle. If it is against public policy and void in one form of action, no good reason exists why it should not be equally so in the other, as having in each suit the tendency to interfere with the due administration of the law. Punishment for crime is intended to be personal and absolute; and, to accomplish the prevention of crime which is the purpose of the pun-

³⁵ *State v. Wignall*, 128 N. W. 935.

^{36a} 18 Ohio, 81, 51 Am. Dec. 442.

³⁶ *Houston Ice Co. v. Sneed*, 132 S. W. 386.

^{36b} 1 Edw. Ch. (N. Y.) 212.

ishment, it is quite necessary that the person should not "even entertain the hope of indemnity" for the offense committed. Therefore, as the penalty and cost of the violation of a penal law is not the legal subject-matter of contract for indemnity, we are of the opinion that it should be here held, as we do, that the damages recovered are not for the same reason allowable in this case. It follows that, if the fine and costs of the prosecution are not allowable, the balance of the damages could not be allowed. To allow damages for mental anguish suffered in consequence of his conviction would in tendency make it profitable to violate the law, and oppose the principle of denying any redress for a violation of the law.

REFORMATION OF INSURANCE POLICY.—In *Niagara Fire Ins. Co. v. Jordan*,³⁷ the plaintiff made an oral contract with an insurance company to insure his property. The policy was subsequently delivered to him but he put it away without reading it, and did not discover until three months later when the property was burned that by a mistake of the agent a name other than that of the insured had been inserted as the beneficiary. The Supreme Court of Georgia held that equity would reform the policy so as to make it read as it was intended to read. It said that a failure to inspect the policy, which was in plaintiff's possession for nearly three months, was not such laches and negligence on his part as to preclude any right of reformation of the policy. The trend of authority is that a mere failure of the insured to read his policy does not amount to such laches as will debar him from having such policy reformed for mistake therein. A policy of insurance is issued by the insurer and signed by him or his agent. It is not contemplated that the insured shall sign it. In the insurer's promise to deliver an accurate policy, according to his oral agreement with the insured, the insured had a just expectation that there will be no designed variance. A man should not be permitted for his pecuniary advantage to impute it to another as gross negligence that the other trusted to his fidelity to his promise. The case is quite different from those instances where a man, who has negligently signed a contract, endeavors to be relieved of its obligation by setting up his own negligence. "There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations."

This decision is in line with an Illinois case,³⁸ where a man applied to an insurance company for a policy on his house, No. 59 Milwaukee avenue, and the agent examined the premises and an oral contract to insure the house was entered into, and the writ-

³⁷ 68 S. E. 611.

³⁸ *Home Insurance Company v. Myer*, 93 Ill. 272.

ten policy subsequently delivered. The house being afterwards destroyed by fire it was discovered that the policy as issued described it as No. 57 Milwaukee avenue. In a suit at law on the policy A could not have recovered for he could not prove that 57 Milwaukee avenue had been destroyed, nor could he prove by oral evidence that the parties had intended to insure No. 59 and not No. 57—because this was contrary to the rule that a written agreement cannot be varied or contradicted by parol. But the Supreme Court held that a court of equity would correct or reform the policy so as to express the real intention.

PAROL PROOF OF WRITING REQUIRED BY STATUTE OF FRAUDS.—If the “note or memorandum in writing” required by the fourth and seventeenth sections of the Statute of Frauds be lost or destroyed, can parol proof of the contents of the note or memorandum be introduced after proof of the loss or destruction of the writing? Stated otherwise, the question is: If the note or memorandum be properly made out and signed, but afterwards becomes unavailable through loss or destruction, can secondary proof of its contents be admitted? This question has arisen in a number of cases and in all (so far as the writer is aware), except one, it has been answered in the affirmative; for instance, by the courts of Alabama,³⁹ Illinois,⁴⁰ Indiana,⁴¹ Iowa,⁴² and Wisconsin.⁴³ These were all cases of ante-nuptial agreements in regard to which the statutes of the various states are substantially the same as the English statutes, excepting that of Alabama, which declares that such parol agreements shall be “void.” However, no particular stress seems to have been laid upon this word.

The North Carolina Court, in a case of a contract for the sale of land,⁴⁴ held to the contrary, stating that the contract must be proved by the writing itself. The decisions of the majority seem to the writer to proceed from a misapprehension, or rather non-apprehension of the intent and purposes of the two sections of the statute. The courts holding the majority doctrine base it upon that general rule of evidence that where documentary proof is lost, then parol may be admitted. The Iowa Court, in the Devoe case, which is the only one of the above cited cases which discusses the question at all, said:

“While it is a general principle firmly established in the interests of justice, that the best evidence capable of production shall be required, this rule in no way conflicts with the admission of secondary evidence of a lost instrument, even though it be one which the law requires to be in writing; for if the instrument were lost without the fault of either party, or if it were wantonly destroyed or secreted by any one, it would be a manifest subversion of justice to deny oral proof of its contents after satisfactory proof of its loss or destruction.”

³⁹ Wilson v. Holt, 83 Ala. 538.

⁴⁰ Spencer v. Boardman, 118 Ill. 553.

⁴¹ McNutt v. McNutt, 116 Ind. 545.

⁴² In re Devoe's Estate, 113 Ia. 4.

⁴³ West v. Walker, 77 Wis. 557.

⁴⁴ Winders v. Hill, 114 N. C. 614.

Of course, neither the existence nor the wisdom of this general rule is questioned. But it is difficult to see how it can apply to the writing required by the fourth and seventeenth sections of the statute. Secondary proof of the contents of a lost writing is, in general, allowed from the very nature of the case. For contracts in general are not required to be proved in any particular way. The writing, if there be any, is first called for, not by reason of any particular legal potency it possesses, but merely from the fact that it is in fact the best evidence. It contains the words assented to by both at a time before controversy arose. Manifestly it is of a higher quality of proof than the several parties' own versions of what was said and done; but if the writing is lost, there is no reason why any other probative facts should not be considered. The writing is not the only testimony to the transaction. In fact, contracts generally may be formed without any writing at all; and if a writing be agreed to, it does not raise the agreement above the dignity of a parol contract.

But in that class of contracts embraced within the fourth and seventeenth sections of the statute, it is different. The law requires a note or memorandum in writing of the agreement to be made. The purpose of those sections was not to lay down the elements of the particular classes of contracts provided for therein, but to prescribe a rule of evidence. The elements of the contracts and their validity were unchanged. But experience has shown that those particular classes of transactions afford such good opportunity for and so great temptation to perjury that the Parliament declared by the statute that they should not be enforced unless proved in a particular way, that is, by "note or memorandum in writing." The writing provided for in these two sections is admitted by all to be evidentiary and not constitutive. To say that the writing is evidentiary is to imply that it is to be exhibited to the court, for evidence in the legal sense is not something which is stated or brought out on the street or in a shop. It is testimony of a probative character presented to the court. Let us suppose that the writing has at one time existed and that A. and B. saw it. Is that any documentary proof to the judge who has only the tale of A. and B.? When the statute provides that these contracts should not be enforced unless proved in a prescribed way, before whom did the Parliament contemplate that the prescribed proof should be made? Before bystanders or volunteers on the street? or before the judicial officers having cognizance of the case? The purpose of the act, that is, to prevent the getting up of false contracts by perjury, is thwarted by such a construction of its provisions. The statute is predicated upon the assumption that there will be attempts to force false contracts on men by means of perjury. Let us suppose that D. comes before the court claiming that C. and he entered into a contract based upon the consideration of marriage. The court asks D. whether his contract was in writ-

ing. He answers "No." Then the judge says: "This court cannot hear you; for you may be swearing falsely, as it is a kind of contract in which experience shows much perjury to have been committed. You should have had a writing, and not having it your case is dismissed." But let us suppose that D. comes to the court and when he is asked whether his alleged contract was in writing, answers, "Yes, it was in writing, but I have lost it." This time the shrewd judge in effect says: "Your claim is good. If this case depended only upon your own word, I should not allow your action. But since you say there was a writing, this corroborates your parol proof and all danger of perjury is removed. You might swear falsely to the existence of a contract, but I know you would not as to the existence of a writing."

The above is precisely the attitude taken by the courts which permit such "secondary" proof of the contents of the note or memorandum. These courts ignore wholly the fact that the writing is not constitutive but evidentiary.⁴⁵

PUBLIC MONEY NOT TO BE USED TO PAY PRIVATE DEBTS.—In a recent Georgia case,⁴⁶ where a county treasurer embezzled funds of the county, and a judgment was rendered against him and the sureties on his official bond, and the latter made payments partly extinguishing the indebtedness, a subsequent resolution, passed by the General Assembly, which authorized the county authorities to refund to the sureties any and all sums which they had paid, except such amount as had been expended as costs in the prosecution of the principal, was unconstitutional and void.

The Supreme Court says that if the legislature would not have the right to give from the treasury of the state a portion of its funds to sureties who had paid in such money, certainly they could not make such a gift from the county treasury. The funds of a county generally arise from taxation. If when a defaulting treasurer embezzles such funds, and when his sureties, against whom a judgment has been rendered on the bond, pay a portion of the indebtedness against them, the legislature can require the county to give it back to them, the taxpayers may have again to pay taxes to replace the funds so lost and needed for public purposes, and, in effect, be taxed to make a gift to the sureties.

The decision was made with particular reference to a clause of the Georgia Constitution expressly providing that "the General Assembly shall not, by vote, resolution or order, grant any donation or gratuity in favor of any person, corporation or association," but without that the case was one for the application of the principle of *Loan Association v. Topeka*.⁴⁷

DAMAGES AGAINST CARRIER FOR DELAYING ONE'S WARDROBE.—When may one who has broken a contract be made to pay dam-

⁴⁵ Connor Hall, Charleston, W. Va.

⁴⁶ Smith v. Fuller, 69 S. E. 177.

⁴⁷ 20 Wall. 655.

ages for mental anguish and pain which the breach has caused the other party. The action for breach of promise of marriage is one case,⁴⁸ and in Louisiana not long ago a bride to whom a fashionable milliner had failed to deliver her trousseau on her wedding day according to contract was entitled, said the Supreme Court, to recover damages not only for her disappointment in not having the dresses in time for the wedding and her mortification in having to go to her husband unprovided with suitable clothes, but also for what she had lost in entertainments which had been planned for her by her friends, and which she had to forego for want of proper gowns.⁴⁹ In a recent case in Georgia the Supreme Court rules that a passenger whose trunk has not been delivered in good time by a carrier is entitled to more than merely general damages. The plaintiff was a female and she alleged in her petition that by reason of her trunks not being delivered for ten days after they should have been, she was deprived of the use of the clothing and wearing apparel of herself and of her children for a period of about nine days, and that she was unable to buy additional clothing and extra wearing apparel as a substitute for that contained in her trunk; that, because of the deprivation of the wearing apparel, she and her children were forced to go without a change of clothing for nine days, and during this time the clothing which she and her children wore became so soiled and filthy as to be indecent, and, being so far from home and among strangers, it caused her great physical discomfort and mental anguish and pain.

The trial court sustained a demurrer to the petition, but on appeal this ruling is reversed. Hill, C. J., says:

"It is insisted that plaintiff cannot recover damages resulting because of 'physical uncomferture and mental anguish and pain' due to the wearing of soiled clothes by herself and children. It is conceded that she could recover damages for the loss of her trunk, or for injury to the trunk or its contents, or for its unreasonable delay and detention, but that 'physical uncomferture and mental anguish and pain,' and inconvenience on account of her not having the use of her wearing apparel that was in the delayed trunk, were not elements of damage for which she would have the right to recover.

"We are inclined to think that a passenger whose trunk has been unreasonably delayed, and who is thereby subjected to inconvenience resulting from the loss of wearing apparel, and is compelled to suffer physical discomfort by reason of its loss, would be entitled to damages upon proper proof, if the damages that are inflicted could be estimated in dollars and cents. Certainly the physical discomfort and inconvenience of having one's clothing lost would be an element of damage in contemplation of the parties to the contract of transportation, when the trunk was received for shipment from the passenger by the railroad company."⁵⁰

CORPORATIONS LIABLE CRIMINALLY.—The Supreme Court of North Carolina rules that corporations may be prosecuted under a

⁴⁸ Lawson, Contr., sec. 403.

⁴⁹ Lewis v. Holmes, 34 South. 66; 109 La. 1030.

⁵⁰ Ford v. R. Co., 68 S. E. 1072.

statute making it a misdemeanor for any tenant during or after his term willfully and unlawfully to destroy or damage any tenement house or outhouse belonging to the landlord or upon his premises, or unlawfully and willfully to destroy or injure any fence, or cut or destroy timber or other trees belonging to the landlord.⁵¹

This decision, it is said,⁵² is in general harmony with those of the New York Court of Appeals in *People v. John H. Woodbury*,⁵³ *People v. Rochester R. Co.*,⁵⁴ and of the Supreme Court of the United States in *New York R. Co. v. U. S.*⁵⁵ In the latter case the court remarked:

"It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crime we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them."

In *People v. Rochester R. Co.* it is true that the Court of Appeals held that the provisions of the Penal Code defining homicide and manslaughter as the killing of one human being by another do not include corporations, and therefore that a corporation is not indictable in New York for manslaughter. While probably little practical benefit would result from so amending the law as to render corporations criminally liable for homicide, the general policy of making them amenable to penal law, in like manner as natural persons, where such course can have any practical efficacy as a deterrent, is to be commended.

MALICIOUSLY DEFENDING A SUIT.—The rule in most of the states is that a suit for damages will not lie for the malicious prosecution of a civil suit unless there was some interference with person or property, as by arrest, attachment, institution of bankruptcy proceedings.

A recent Kansas case presents the question of a malicious defense, and the conclusion is that a defendant is not liable to be sued for exercising his right to make the plaintiff prove his case, the court saying:

"The question is this: A defendant is haled into court and required to defend against claims set forth against him in a civil action. Without asking any affirmative relief whatever, he simply files a general denial and verifies it. Although there may be many things alleged in the petition as true that he knows are true, and although he may know that it will involve the plaintiff in considerable expense to prove and establish the truth thereof, is he responsible for making such defense? The appellant does not even discuss the question in his brief, and not a single authority is cited. It is a maxim of the law that 'for every wrong there is a

⁵¹ *State v. Rowland Lumber Co.*,
69 S. E. 58.

⁵² *New York Law Jour.*

⁵³ 192 N. Y. 455.

⁵⁴ 195 N. Y. 102.

⁵⁵ 212 U. S. 481.

remedy.' It contemplates, however, that a wrong is suffered by the unlawful act of another. Opposed to this maxim is the other maxim, 'De minimus non curat lex.' Even the ordinary costs of court are at common law considered among the small things for which the law did not care. The right to recover costs by the successful party in a litigation depends entirely upon the statutory provisions; at common law each party had his own costs to pay. But while our legislature has made the provision that the successful party in a suit should recover the statutory costs of officers and witnesses, it has gone no further. So far as we are advised, no state in the Union has gone to the extent of providing that the defeated party should pay even the counsel fees of his successful opponent—and counsel fees are almost a necessary incident to every litigation. Indeed, the expenses incident to a lawsuit, either in prosecuting or defending, are frequently, if not generally, far in excess of what are properly termed 'costs of the case.' In this state, and quite generally in other states, it has been held that damages for malicious prosecution of a civil action as well as for a malicious criminal charge may be recovered; expenses incurred and damage to business, and even exemplary damages, have been allowed in such cases. We have failed, however, to find any authority for assessing damages for a malicious defense of an action. Indeed, it has been said that self-defense is the first law of nature, and one who physically assaults another cannot recover damages of the other for physical injuries inflicted so long as the other acts simply on the defensive and does no more than is necessary to repel the attack; even if the assailant be killed in the affray, if the assailed does nothing more than is reasonably necessary under the circumstances to defend his own life, he is not responsible either civilly or criminally."⁴⁸

MANSLAUGHTER THROUGH FRIGHT.—In a recent case in Idaho, the prisoner asked for his release on habeas corpus from a committal on a charge of manslaughter, on the ground that no offense was shown to have been committed by him. The prisoner it appeared had gone to the residence of one Barton, in whose house his mother-in-law, Mrs. Riegelman, resided, for the purpose of calling him to account for words spoken by him, and there engaged in an altercation with Barton, in which blows were struck. Mrs. Riegelman witnessed the altercation, and she died almost immediately from an aneurism of the ascending aorta, which was ruptured, as was alleged, because of the excitement. The statute under which the petitioner was held defines involuntary manslaughter as "the unlawful killing of a human being . . . in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection." Ailshie, J., in a very interesting opinion remanding the prisoner to custody,⁴⁹ gives an historical summary of the law of homicide and the necessity of a corporal injury, which in the early history of the common law was always essential. Fright, fear, nervous shock, or producing mental disturbance, could never be the basis of a prosecution for homicide. East, in his Pleas of the Crown, says: "Working upon the fancy of another or treating him harshly or unkindly, by which he dies of

⁴⁸ *Baxter v. Brown*, 111 Pac. 430.

⁴⁹ *Ex parte Helgho*, 110 Pac. 1029.

grief or fear, is not such a killing as the law takes notice of." The ancient English authorities establish this to have been the early English rule.⁶⁰ This rule appears, however, to have been gradually modified and greatly relaxed in modern times by most of the English courts. So in later years we find the court holding a prisoner for manslaughter where his conduct toward his wife caused her death from shock to her nervous system. And in *Reg. v. Dugal*, a Canadian court held the prisoner guilty of manslaughter where with violent words and menaces he had brandished a table knife over his father, and the latter became greatly agitated and weakened from the fright, and died in 20 minutes thereafter of syncope.⁶¹

In *R. v. Towers*,⁶² decided in 1874, the defendant struck a 12-year-old girl who was holding a small child in her arms, and the child became frightened and went into convulsions, and lingered for about six weeks and died, and the court held the facts sufficient to go to the jury on a charge of manslaughter. That is the only reported case where death resulted from fright, and the cause of fright had not been directed by the accused at the deceased, but had, on the contrary, been directed at some third party. And it is in principle nearly parallel with the one at bar. In *Cox v. People*,⁶³ where the prisoner assaulted and bound the deceased and left her in that condition, and it was supposed that she died of fright, the Court of Appeals said that this was murder. The text writers on the subject have touched on this phase but lightly. Stephen, in his *Digest of Criminal Law*,⁶⁴ commenting on the old rule, says; "Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life, or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear, 'Your wife is dead,' intending to kill and killing him, why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct gradually 'breaking a man's heart' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be murder?" An American writer, speaking of the reason for the old rule and the modern trend of authority, says that a hint of the reason for this

⁶⁰ 1 Hale P. C. 425-29; Steph. Dig. Cr. Law, Art. 221.

⁶¹ *Reg. v. Murton*, 3 F. & F. 492; 4 Quebec, 492.

⁶² 12 Cox's Cr. C. 530.

⁶³ 80 N. Y. 500.

⁶⁴ Art. 221.

exclusion may be gathered from Lord Hale's assertion that 'secret things belong to God,' upon which Sir James Stephen comments that he suspects the fear of encouraging prosecutions for witchcraft was the real reason. In default of a better explanation it would seem, therefore, that the rule has no firmer foundation than the ignorance and superstition of the time in which it was formulated.⁶⁵

Is the same explanation to be given of the senseless and unjust rule of a majority of our courts in which the question has been presented that damages are not recoverable for an injury through negligent conduct producing mental suffering or fright without corporal injury.

AUTO-INTOXICATION AND ACCIDENT INSURANCE.—Certainly in this day of much litigation growing out of the recklessness of the chauffeur and the activity of the human mind in inventing methods to circumvent the drastic liquor laws of some of the states, the combination auto-intoxication, in connection with an accident would convey to the average reader either an automobile casualty or a carouse. But it is neither; it is a disease. It makes its appearance in an action by a widow on a policy on her husband insuring against death from bodily injury from external violent and accidental means. The deceased was a physician and while getting out of his buggy at his home, fell to the ground and hurt himself. He did not leave his home again, but died in about 10 weeks, having been ill all the time. The claim that the fall was the cause of his death was supported by two physicians, who testified at the trial. The first, Dr. H., said that he was called to visit the deceased two days after the fall and found him very ill, and his examination continued as follows:

"The deceased said to me that he had had a fall out of his buggy, and that he thought it shook him up worse than the other fall. He had reference to the fall he had when he fractured his rib, and for which I didn't attend him, but I saw him socially during that time, and this was the fall he was referring to when he said this last fall shook him up worse than the other fall. Q. What causes auto-intoxication? A. Anything that will prevent nature from taking care of the products entering the alimentary canal, and thus allowing it to ferment in the system; anything that will prevent the liver from secreting its bile, and the stomach from doing its part; anything that would prevent any of those would contribute to auto-intoxication. In this case the most satisfactory explanation of the case was this history of the fall that he had at that time which shook him up and his alimentary tract was not doing the work, and we were never able to make it do the work to amount to anything at all. Q. I will ask you whether or not the fall of which he told you, in your opinion, produced this auto-intoxication? A. In my judgment that was the cause. Anything that would shake up the nervous system to such an extent as to paralyze would cause these organs to go on a strike, and we were never able to make them work any more."

⁶⁵ 21 Am. & Eng. Encyc. 98.

The second expert, Dr. D., when asked to explain to the jury what auto-intoxication was, said: "Auto-intoxication is a condition wherein a man is poisoned by products which have formed in his own body. Auto means by itself; intoxication, a condition of poisoning. An auto-intoxication means the absorption of these poisons that are generated in the body of the man. They are not generated from the outside, but are generated from the inside, and they get into his circulation and interfere with his metabolism. Metabolism is that change that is constantly taking place in a man's body. Now, auto-intoxication can be brought on by an alteration of the metabolism. Frequently it comes by acute indigestion. Some condition that would tend to lower the vitality and make the man a fit subject for auto-intoxication. It can be produced by bodily injuries, or anything that would tend to lower the vitality of a man." Notwithstanding this learned testimony, the Court of Appeals ruled that the death was caused by disease and not by accident, and reversed a judgment for the plaintiff in the court below.⁶⁸

CARRIER'S RIGHT TO DEMAND PAYMENT IN ADVANCE—UNJUST DISCRIMINATION.—The Supreme Court of Mississippi rules that for a carrier to exact payment of freight charges in advance from one customer and not from another is not an unreasonable discrimination at common law, saying:

"We do not perceive any legal wrong done to one to whom credit may not be given, because it is given to others, it may be, because of their punctuality in paying bills whenever they are presented." It is hardly conceivable that a carrier would arbitrarily require the prepayment of freight charges of some of its customers, and not of others, under exactly the same conditions. Until the legislature finds the existence of such an evil, and provides a remedy by law, the courts are without power to do so."⁶⁹

The court cites a decision of the Federal Court,⁶⁸ that such a practice was not the giving of an undue or unreasonable advantage under the interstate commerce law. This is in harmony with the rule before the day of regulation of carriers' charges that a carrier must not charge more than a reasonable rate for the carriage. But to charge A more than B was not illegal if A was not charged more than what was reasonable. "To charge one man too little," said the court, "is not charging another man too much."

THE AUTHORITY OF THE BELL BOY.—In a recent case in Colorado a guest at a hotel who had arrived late at night on rising in the morning summoned a bell boy to whom he handed a rail-

⁶⁸ Aetna Ins. Co. v. Bethel, 131 S. W. 525.

⁶⁹ Russell Co. v. Miller, 53 South. 495.

⁶⁸ 63 Fed. 775.

road check for his trunk, telling him to give it to the hotel clerk and have the trunk brought from the depot. The boy went away but the trunk never came, and the check was never returned. This action was brought against the innkeeper for the lost trunk. The court held that where a traveler has become a guest of a hotel and delivers his baggage checks to the innkeeper's representative or agent, the innkeeper thereby becomes responsible for the baggage, though it is never brought within the walls of the hotel. But the next question was whether the bell boy was an authorized agent within this rule. On the trial the plaintiff desired to show by a witness of experience in the management of hotels, what the custom was concerning the delivery of checks calling for baggage in such cases; also, what the duty of the bell boys was, and what the employes of a hotel consist of, but the offer was rejected. On appeal to the Supreme Court this ruling is reversed, the court saying:

"When the plaintiff became a guest at defendants' hotel, he had a right to assume that the authority of its manager, bookkeeper, cashier, porter, and bell boys was the same as that prevailing generally in all other hotels of the same class and character, and he had a right to rely upon the prevailing customs, if any such existed, until the contrary was brought to his knowledge. The question concerning the bell boy was not whether it was his duty to secure baggage and deliver the same to the guests at the hotel, but whether it was within the apparent scope of his authority or duties to receive from the guest and transport to the office the check for the baggage with the message intrusted to him by the guest concerning the disposition of the check. If it is the custom, after the bell boy has been given the key to your room, and by instructions from the clerk or by common custom takes your hand baggage for the purpose of showing the room to you to thereafter be given your check for your baggage for the purpose of having it (the check) taken to the office in order to have your trunk brought from the depot and delivered to your room at the hotel, then it was within the apparent authority of the bell boy to receive the check for the purpose of taking it to the office, and, if such was the general custom, then the appellant had a right to rely upon this uniform usage or custom in delivering his check to the bell boy, and the proprietor will be responsible upon account of any loss occasioned thereby. It is true a usage or custom to be adopted as a rule of law should be certain and general in the branch of a trade or business in regard to which it is set up, so as to authorize the presumption that it is known to those dealing or concerned in that branch of trade or business. And, under the circumstances of this case, if such a system or custom was in general use, and such an undertaking was consistent with what a traveling guest had a right to expect in accordance with the rules and usage prevailing generally at similar hotels, and no notice was brought to the attention of the guest to the contrary, then he was justified in making such disposition of his check, and should have been allowed to show that such a general usage and custom prevailed, and it was error to exclude this testimony, or to give the instructions complained of, or to limit the scope of this inquiry to the hotel of the defendants only."⁹⁹

⁹⁹ Keith v. Atkinson, 111 Pac. 55.

NOTES OF RECENT DECISIONS.

BANKS AND BANKING—SAVINGS BANKS—PAYMENT OF DEPOSIT.—C., falsely representing himself as the owner of a savings bank deposit, presented the book to defendant, and demanded payment. Defendant, not being satisfied with his identification, caused its comptroller to draw a check for the amount to the order of its teller who indorsed the check to the order of the depositor, and handed it to C., who induced plaintiff to cash the check, which was subsequently paid by the drawee bank on an endorsement, which was thereafter held to be a forgery. The drawee bank having recovered the money from a bank in which plaintiff had deposited the check for credit, that bank sued plaintiff to recover the amount, and he notified defendant bank to defend the suit, which it declined to do, and plaintiff, having been cast therein, sued defendant bank to recover *ex delicto* the amount of the check and the costs of the litigation. *Held*, that, since defendant discharged its obligation when it provided funds for the payment of the check and the check was paid, it was under no obligation to defend the suit against plaintiff, nor was it liable to plaintiff to refund.¹

CARRIERS OF PASSENGERS—PROTECTION OF PASSENGERS AT DEPOT.—A. went to a station to take a train which was about two hours late, and while waiting in the waiting room of the station was injured in a scuffle among several boys who had entered the depot. There was no agent of the defendant in the depot at the time. *Held*, that the negligence of defendant in not having a station agent present was not the proximate cause of A.'s injury, as defendant could not anticipate such result.²

CARRIERS OF PASSENGERS—VIOLENT COUPLING OF CARS.—A passenger on a mixed train was not negligent in leaving his seat to change to the shady side of the car, as affecting the carrier's liability for injury to him caused by violent coupling of the cars, where the passenger cars had been waiting on the side track for about three-quarters of an hour; the passenger not being bound to look out of the window to ascertain whether a coupling was about to be made.³

CARRIERS OF PASSENGERS—DUTY TOWARDS INTOXICATED PASSENGER.—A carrier, which by collecting fare from a person known to be intoxicated accepts him as a passenger, is bound to exercise reasonable care for his safety, having regard to his known condition.⁴

CONSTITUTIONAL LAW—LIBERTY TO CONTRACT—HOURS FOR EMPLOYMENT OF WOMEN—CLASS LEGISLATION.—The statute which provides that no female shall be employed in any factory, mill, or warehouse, etc., or any place where any kind of manufacture is carried on, more than nine hours a day, is a valid exercise of the police power, and is not in violation of the fourteenth amendment, as interfering with the rights to labor and to make contracts pertaining thereto. Nor is it class legislation because it excepts canning factories.⁵

CONSTITUTIONAL LAW—HOTELS—CLASS LEGISLATION—IMPRISONMENT FOR DEBT.—The classification of hotels according to the number of rooms they contain for the purpose of determining the fee each class should pay for the inspection thereof is within the discretion of the Legislature, which cannot be questioned, unless it is manifestly arbitrary and unjust. A statute providing for the imprisonment of a hotel keeper for refusal to

¹ Gallo v. Brooklyn Sav. Bk., 92 N. E. 633 N. Y.

² Mo., etc., R. Co. v. Smith, 133 S. W. 695 Tex.

³ Lancon v. R. Co., 53 South. 365 La.

⁴ Donovan v. R. Co., 183 F. 526.

⁵ Withey v. Bloom, 128 N. W. 913 Mich.

pay hotel inspection fees, contravenes the section of the constitution prohibiting imprisonment for debt.⁶

CONTRACTS—ILLEGALITY—COMPOUNDING FELONY.—Under the statute punishing the compounding of felonies, an agreement not to prosecute a criminal charge for seduction in the event of a satisfactory settlement of a civil suit by prosecutrix for damages was illegal.⁷

CONTRACTS—UNDUE INFLUENCE—HUSBAND AND WIFE.—Where a wife, who was possessed of large separate estate, gave a guarantee to a bank in order to help her husband and a company in which he was largely interested, which was in pecuniary difficulties, alleging that she acted of her own free will, without any pressure having been put upon her, and that she would not have taken advice from anyone, but it appeared that she acted in passive obedience to her husband's directions, and would have signed anything that he asked her to sign, and had no means of forming an independent judgment if she had desired to do so: *Held*, that the transaction could not stand.⁸

CORPORATIONS—LIGHT AND POWER COMPANY—UNREASONABLE REGULATION.—A corporation organized to supply a municipality with electric light, steam, and hot water heat was given a franchise to use the streets for its pipes, etc. This corporation later imposed a condition that no one who did not use the electricity could have steam. *Held*, an unreasonable and unwarranted condition; it being the privilege of its patrons to determine what commodities they would purchase.⁹

COURTS—DECISIONS—STARE DECISIS.—Decisions of courts of last resort, except in the case in which they are rendered, are not law, but mere evidence of the law, of greater or less persuasive force according as they are harmonious, apparently well considered, and of long standing, but they do not require the application of the rule of stare decisis until they have been published in the reports provided by law for their publication or are of such long and unchallenged standing that they may reasonably be presumed to have become publicly known.¹⁰

CRIMINAL LAW—CONFESSIONS—EFFECT OF ARTIFICE IN INDUCING.—Artifice, trickery, or fraud in inducing a confession does not alone make it inadmissible, but otherwise if such means involve a promise tending to induce a false confession.¹¹

DAMAGES—LIQUIDATED DAMAGES—DELAY—NATURE OF CONTRACT.—Defendant safe deposit company contracted with plaintiff for the construction of a fire-proof vault, for a fire-proof and burglar-proof safe, and for a fire and burglar proof vault; the work to be completed by a specific date. The contract provided that time should be of the essence thereof, and that the contractor should pay a specified sum as liquidated damages for each day's delay in the completion of the work. *Held*, that such contracts were within the class in which damages from a failure to complete the work contracted for by the date fixed would be uncertain, if at all capable of exact ascertainment, and the amounts specified, not being plainly disproportionate to the injury, were properly regarded as liquidated damages.¹²

DIVORCE—JUDGMENT IN ANOTHER STATE—CONCLUSIVENESS.—A state is not bound under the full faith and credit clause of the Federal Constitution to recognize, as against its citizens, divorces obtained in other states by publication at a place other than the matrimonial domicile; but each state

⁶ State v. McFarland, 110 Pac. 792 Wash.

⁷ State v. Johnson, 128 N. W. 837 Ia.

⁸ Bank v. Stuart, 103 L. T. 641 Eng.

⁹ Seaton Co. v. Idaho Co., 111 Pac. 834 Colo.

¹⁰ Herron v. Whitely Co., 92 N. E. 555 Ind.

¹¹ People v. Dunnigan, 128 N. W. 180 Mich.

¹² Mosler Safe Co. v. Malden Lane Co., 93 N. E. 81 N. Y.

may determine for itself what effect it will give to such decrees, and the court may enforce a decree so far as it affects the marriage status, and yet permit the wife domiciled in the state to sue for alimony.¹²

DIVORCE—CONFESSIONS—PROOF.—In a suit by a wife against her husband for divorce for adultery, his confessions of guilt, made to his wife and her sister, though sufficient to convince to a moral certainty, are insufficient without further corroboration to sustain a decree.¹³

ELECTIONS—DISQUALIFICATION OF VOTER "UNDER CONVICTION."—A citizen who has been convicted of bribery in an election, and has undergone the punishment fixed by the judgment, is a qualified voter.¹⁴

EVIDENCE—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.—A self-incriminating letter written by accused to his wife, but not received by her, being intercepted by the sheriff, is not privileged within the statute which prohibits examination of spouses respecting communications between them.¹⁵

FRAUDS, STATUTE OF—AGREEMENTS NOT TO BE PERFORMED WITHIN YEAR—POSSIBILITY OF PERFORMANCE WITHIN YEAR.—A contract which requires one party to sell and the other to buy for a period of more than a year all of an article the seller may accumulate cannot be held valid because of the possibility that the seller may not accumulate any material during the latter part of the term, since the possibility of performance within a year is not sufficient, if the contract positively requires certain conduct as to the subject-matter for a longer time.¹⁶

GOOD WILL—RIGHT TO CARRY ON BUSINESS.—Though a business is transferred, together with the good will thereof, the assignor may carry on a similar business in the same locality, in the absence of an express agreement not to do so.¹⁷

LANDLORD AND TENANT—LIABILITY OF TENANT—INJURY TO THIRD PERSON.—Defendant athletic club leased for one night only for an athletic exhibition an armory newly constructed by the state under a law providing for the most careful and rigid architectural supervision. A railing which appeared to be safe gave way because of a latent structural defect, and plaintiff and other spectators were injured. *Held*, that defendant was not liable.¹⁸

MASTER AND SERVANT—LIABILITY OF MASTER—ACTS OF SERVANT.—Where an owner of a horse and carriage lent them, with his driver, to a third person, for use by the third person in his business, the care and management of the horse was retained by the owner through his driver, in the absence of any express agreement to the contrary, and the driver for the purpose remained the owner's servant, so as to charge him with the driver's negligence.¹⁹

MUNICIPAL CORPORATIONS—USE OF STREETS—COMPENSATION FOR USE OF SUBWAYS.—Where the fee in streets is in the city, or in the state, and held for the use of the city, the city may by ordinance require persons who use subways beneath sidewalks adjoining their property to pay for the use of such space.²¹

¹² *Toncray v. Toncray*, 131 S. W. 977 Tenn.

¹³ *Howard v. Howard*, 78 A. 195 N. J.

¹⁴ *Osborne v. Co. Ct.*, 69 S. E. 470 W. Va.

¹⁵ *People v. Dunnigan*, 128 N. W. 180 Mich.

¹⁶ *Keller v. Mayer Co.*, 132 S. W. 314 Mo.

¹⁷ *Von Bremen v. McMonnies*, 93 N. Y. 186 N. Y.

¹⁸ *Greene v. Seattle Club*, 111 Pac. 157 Wash.

¹⁹ *Corliss v. Keown*, 93 N. E. 143 Mass.

²¹ *Tacoma Safety Dep. Co. v. Chicago*, 93 N. E. 153 Ill.

MUNICIPAL CORPORATIONS—DEAD ANIMALS—POLICE POWERS.—Subject to reservations as to the right of property in the owners of dead animals, a municipal corporation may confer on individuals the exclusive right to remove them, on the theory that in practical application the object can be better accomplished by those prepared for the work.²²

NEGLIGENCE—INJURIES TO PERSONS ON ADJACENT PREMISES.—One in her garden was struck by a piece of iron thrown from an adjoining factory. The workmen had daily for a year or more thrown pieces of iron from the windows of the factory into the garden in disregard of the safety of persons there. The master had been informed of the practice, and the precautions he took to prevent the same were not effective. *Held*, that the master was liable for the injuries sustained.²³

NEGOTIABLE PAPER—FRAUD—BONA FIDE HOLDER.—When an illiterate colored woman over 70 years of age was by false and fraudulent representations induced to sign certain negotiable promissory notes and mortgages securing the payment of the same under the belief that she was signing her last will and testament and a power of attorney, such promissory notes are unenforceable in the hands of a bona fide holder; it appearing that the maker was free from negligence.²⁴

RAILROADS—DESTRUCTION OF PROPERTY BY FIRE—LIABILITY.—Plaintiff piled ties on a railroad right of way without the consent of the company, to remain there for an indefinite time. There was no custom authorizing the piling of ties on tracks for such purpose. The general manager on discovering the ties, notified plaintiff to remove the same, but they were not removed. *Held*, that the company was not liable for the negligent destruction of the ties by fire set by a locomotive.²⁵

SALES—PATENTED CHATTEL—SALE SUBJECT TO CONDITIONS.—A patentee may make a sale of the patented chattel subject to restrictive conditions, which would not apply to the case of the sale of ordinary chattels, and the purchaser will be bound by such conditions if knowledge of them at the time of the sale is brought home to him; but the conditions will not run with the goods in the hands of all persons into whose possession they may come without notice.²⁶

SALES—CONTRACTS—MUTUALITY.—A contract to sell an "estimated tonnage of 50,000 tons" of coal at prices to be determined by the selling price of another kind of coal of the same grade is not invalid as failing to provide for the delivery of a fixed quantity at a fixed price.²⁷

TELEGRAPHS—PROXIMATE CAUSE—FAILURE TO DELIVER TELEGRAM.—Where a telegraph company failed to deliver a message from an insurer's state agent to its local agent canceling a fire policy, and because of such failure the insured property was destroyed by fire before cancellation of the policy, the failure to deliver the message, and not the fire, was the proximate cause of the damages sustained by the insurer.²⁸

TELEPHONES—REASONABLE REGULATIONS—CHARGES.—M contracted with a telephone company for the installation of a telephone at a fixed rate of \$2.50 per month, payable in advance, or \$3 per month if not paid in advance. Soon after he moved, and the telephone was changed to his new residence. Two years later he moved again, and requested that his telephone be changed. The company refused to do so until he paid his arrears for three months' services, amounting to \$9. He refused, but

²² *Smith v. New Albany*, 93 N. E. 73 Ind.

²³ *Hogle v. Franklin Co.*, 92 N. E.

²⁴ *First Nat. Bk. v. Wade*, 111 Pa. 205 Okla.

²⁵ *Spring Garden Ins. Co. v. R. Co.*, 131 S. W. 1147 Tex.

²⁶ *National Phono. Co. v. Menck*, 104 L. T. 5 Eng.

²⁷ 521 Ill.

²⁸ 93 N. E. 134 Ill.

²⁹ *Hunter v. Zenith Co.*, 92 N. E. 795 N. Y.

³⁰ *Providence Ins. Co. v. Tel. Co.*,

renewed his request and sent a check for \$10. The request was not accepted, the company claiming an additional \$3 for another month's rental, M sought mandamus to compel the company to accept his money and install a telephone for him, declaring the extra charge of 50c as unreasonable and invalid, being above the maximum rate (\$2.50) provided for in the company's franchise. *Held*, that the rule was reasonable, such extra charge not being an addition to the rate of the franchise, but a charge for delinquency.²⁹

TRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS OF COURT.—An instruction that: "It is not what counsel say on either side. It is what you have heard from the witnesses. You will have to rely on your own recollection about that. You are to decide it upon that. Counsel are here for a very high and important purpose, to assist the court and assist the jury; but you are not to make the mistake at any time in saying: 'Well, the lawyer said so and so. He believed that was so and so.' That is not to influence you. You are to be influenced alone by the law as the court has told you it is, and by the evidence in the case as you believe it to be. The court cannot interfere with you in that respect, and don't want to. Counsel have no right to interfere with you in your deciding what are the facts, or what is the truth of this matter. That is for you"—was erroneous, as practically telling the jury to disregard the argument of counsel.³⁰

USAGE AND CUSTOM—CARRIERS OF PASSENGERS—RIDING ON PLATFORM.—**NEGLIGENCE.**—1. The court will take judicial notice of the fact that, in the operation of street cars in the City of Washington, it is the custom of the defendant company to not only permit passengers to ride on the platforms of the cars, but to permit the cars to be so crowded as to frequently compel passengers to ride there. 2. In view of this custom, a street railway company can not establish one rule of diligence as to the safety of seated passengers, another as to straphangers, and still another as to persons riding on the platforms. 3. The custom thus established is equivalent to an invitation to passengers to occupy and ride upon the platforms; and the company can not escape the obligation imposed by such custom to operate its cars with due care for the safety of such passengers by posting a notice warning passengers that it is dangerous to ride on the platforms.³¹

WATERS—POLLUTION OF STREAM—RIGHTS OF RIPARIAN OWNERS.—An operator of a saw mill on a stream threw sawdust into the stream, so that the same was deposited in it and in springs near to it. The deposits discolored the water, and in warm weather the decaying sawdust gave it an offensive odor. Live stock in some instances refused to drink the water, and it was less fit for domestic purposes and was unwholesome. Physicians believed that the decaying sawdust deposits affected the purity of the water, and generally caused disease along the streams where found. *Held*, that the use of the stream was in violation of the rights of a lower riparian owner, who could sue to restrain such use.³²

WITNESSES—CREDIBILITY ATTACKED BY EVIDENCE OF GENERAL REPUTATION FOR MORALITY.—In an action brought by plaintiff on a claim which he held against defendant's decedent, plaintiff took the stand in his own behalf. For the sole purpose of discrediting his testimony, the court allowed the defendant to introduce evidence of plaintiff's general reputation for morality in the neighborhood in which he lived. Plaintiff objected that his character was not in issue. *Held*, that the evidence was competent for the purpose for which it was admitted.³³

²⁹ State v. Tel. Co., 109 Pac. 336.

³⁰ People v. Ambach, 93 N. E. 310 Ill.

³¹ Hart v. R. Co., 38 Wash. L. R. 716 D. C.

³² Shoffner v. Sutherland, 68 S. E. 996 Va.

³³ Castle v. Clark, 90 N. E. 640 Ind.

THE DOCKET.

AN old friend and reader of the REVIEW has called attention to an error which appeared in these columns last month, where it was stated that the argument in the Hyde case before the Supreme Court lasted seven days. Our friend very kindly says that the REVIEW is a periodical not edited with haste, it takes its time and speaks advisedly, with vigor, prestige and authority, and, therefore, should be accurate even in the warmth of the advocacy of law reform. The DOCKET regrets the mistake. But he wrote "several"; the printer made it "seven" and stuck to it even after the correction had been made in the proof. But this is an old story from the very beginning of printing. One of the early English law reporters in one of his folios apologizes in his preface for the errors in one of his previous volumes caused by "ye printers' recklysnesse," and with the improvement of machinery and the multiplication of books, good workmanship and accuracy have been largely sacrificed. Compare the old law books and reports with their hand-made paper and beautiful letter press with the modern works of this character set up by machinery and printed on wood pulp paper. A quarter of a century ago a compositor was an expert on the subject of handwriting and the DOCKET has seen in that day a journeyman printer called on the witness stand to identify a piece of disputed handwriting, and he recalls receiving a manuscript from Joel Prentiss Bishop, the well known legal writer, which he was unable to decipher, but which was set up with very few errors when it was sent over to the printing office and fell into the hands of the old compositors. Today these men are no more, and our books are set up by the operators of machines who seem to have no knowledge of chirography and who will hardly attempt to work on anything that has not been typewritten beforehand. In another decade if this method continues to be insisted upon, the men at the typesetting machines will be no more able to read a manuscript in the English language than a Patagonian or an Eskimo.

WHAT good work the old printers did do! The DOCKET has always had a liking for old books, especially old law books and lying on the table before him as he writes is a work which is dear to every lawyer and which the DOCKET discovered in an old book store in London near the British Museum. It is in four volumes, on fine paper, and the type is as clear almost as on the day the book was printed. Its title page reads: Commentaries on the Laws of England, by William Blackstone, Esq., Vinerian Professor of Law and Solicitor General to her Majesty; Oxford,

printed at the Clarendon Press. MDCCLXV. It is the first edition of Blackstone's Commentaries and is the property of the Law School of the University of Missouri. Is there another law school east or west that possesses such a treasure?

SIR WILLIAM BLACKSTONE was born in 1723, the posthumous child of a London tradesman. He was brought up by his uncles, one a silk merchant, the other a surgeon, and at the age of seven he was sent to the Charterhouse, the school of Addison and Thackeray, of Clive and John Wesley. The DOCKET has visited the place and been shown over the great buildings and has seen the boys playing in the cricket field and the old pensioners sitting in the beautiful quadrangle, and he has gone into the Great Hall, one of the finest specimens of a sixteenth century room in England, and into the Chapel, where Thackeray's Colonel Newcome used to sit, and in one corner of which is the grave and monument of Chief Justice Ellenborough.

FROM there young Blackstone went to Oxford, to Pembroke College, Dr. Samuel Johnson's college, whose room and whose enormous tea-pot are still shown to every visitor. His college course finished, he went back to London, studied law and was called to the bar, but after seven years he gave up the struggle and took a fellowship at Oxford. At the suggestion of Lord Mansfield, he delivered a series of lectures on English law, which were attended, we are told, by a very crowded class of young men of the "first families, characters, and hopes," and Blackstone's fame as a lawyer grew in proportion. The King paid him the compliment of asking him to read his lectures to the Prince of Wales, afterwards George III., and when a year or two after a professor was to be appointed under Mr. Viner's bequest to the University, Blackstone was unanimously chosen. For four years Blackstone was Vinerian professor and his lectures in that chair became the great Commentaries, which brought the fortunate author a return of no less than \$70,000, probably the largest remuneration the author of a single legal treatise has ever received. Blackstone's practice at the bar increasing, he resigned the Vinerian professorship in 1762, went back to the bar and took chambers in the Middle Temple. He speedily acquired a large practice, became solicitor general to the Queen, and a bencher of his inn. His Commentaries he wrote on the first floor of 2 Brick Court, Temple, with a somewhat noisy and lively neighbor, Oliver Goldsmith, in the room above him. Very probably, one of his biographers says, "while Blackstone was deep in the mysteries of the feudal system, his investigations were interrupted by the merry companions of Goldsmith singing lustily 'The Three Jolly Pigeons.' These overhead revels naturally did not assist the progress of the great work, and were the subject of

frequent complaint on the part of the Doctor of Laws against the Doctor of Physic." And another of his biographers relates that Blackstone though "always a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work by a temperate use of it." He was elected a member of Parliament and afterwards appointed to a judgeship of the King's Bench. His home was at Wallingford, a small town on the Thames between Oxford and London and one of the pilgrimages that the DOCKET made last summer was to this beautiful hamlet to see the church of St. Peters in which he is buried and the monument which records his virtues and eminent career.

Just one year from the day that the trial of Dr. Hyde for murder by poisoning began in Kansas City, the Supreme Court of this state orders a new trial. In our last issue, the DOCKET made a comparison between this case and the case of poisoner Crippen in England and that comparison is emphasized by this latest turn in this celebrated case. Crippen has been dead and buried for more than half a year, but the Hyde case is just where it started twelve months ago and after weeks and weeks of investigation and examination of witnesses, and speeches of numerous counsel on both sides, and days and weeks of deliberation by a jury of twelve men, and arguments of counsel in the Appellate courts and long consultation and deliberation by three appellate judges, everything has to be gone over again *de novo*. Could there be a more striking illustration of our stage-coach and tortoise-like procedure? The day after the decision was announced, the DOCKET was riding in a street car and observed two ladies reading the morning paper which contained under flaming headlines the announcement of the result. And he heard the remark of one of the two to her companion, "What bad judges we must have. See how many mistakes the judge made in trying Dr. Hyde." Now, the lady had no idea of imputing immorality or dishonesty to the judicial officer she was talking about, she was measuring him by the standard of the good housekeeper and she was amazed that the state should have in its employ an officer who could do no better than that. It was to her as though she had discovered that her cook or housemaid had committed ten or fifteen blunders in preparing the dinner or putting things to rights, and it was clear to her that such a bungling domestic servant would be speedily given her walking papers. But the good lady did not understand that the judicial servant she thought so negligent was just as well qualified and had exercised as much care and had given as much attention to the work he was doing as any other judge would or could who might have sat in the case. She did not know that our court procedure has become so intricate that no man can hope to master all its difficulties or to escape being tripped up by some cleverly devised question to a witness or objection to a

fact offered in evidence. The longer the trial lasts, the more skillful and numerous the counsel engaged in the case and the more money there is behind the prosecution and defense the more difficult it becomes for the trial judge to send the appellate court a record free from technical errors and mistakes. Our appellate judges are no better lawyers, as a rule, than our trial judges. Our appellate bench is recruited from the trial bench and really a more exact knowledge of the law is required of the trial judge than of the appellate judge for he is obliged to make his decision promptly and cannot always wait until he can find what the law is from the books. Therefore it does not show any lack of legal knowledge or of judicial training in a trial judge that his rulings are reversed on appeal. It is simply the appellate judge that has the last word and it is quite probable that had it been Judge Ferris instead of Judge Latshaw who had tried the case and Judge Latshaw instead of Judge Ferris who was sitting on the supreme court bench, the result of the case would have been exactly the same, except that the decision of Ferris, J., would have been reversed by Latshaw, J., instead of *vice versa*.

BUT it is only fair to say that the reversal of the conviction in the Hyde case is not based on technical errors alone, for it seems quite clear that in the opinion of the supreme court, the proof was not sufficient to justify a verdict of guilty. Under such circumstances even had the English statute been in force in this state, which prohibits the court from interfering with the verdict below unless in its opinion there has been a miscarriage of justice, the result would doubtless have been the same. But in England this would have been the end of the case and the profession, the courts and the public would be spared a second long drawn out and inconclusive legal battle which generally follows the granting of a new trial in a homicide case.

THE decision of the Court of Appeals of New York declaring unconstitutional the statute of that state providing for the workman's compensation in certain dangerous employments comes as a surprise and a shock to all those who have been looking forward to a better understanding between employers and employees in the industrial world. Lagging behind all other countries in the matter of compensating the individual workingman and his family for injuries received by him in the course of his employment, we are met on the very threshold of the movement for better regulations and more just laws on this subject by the declaration of the highest court of our greatest state that it is unconstitutional to attempt anything of the kind. The New York Court of Appeals has always been not only conservative but somewhat retrogressive' as Mr. Roosevelt would term it, and it is hence by no means certain that its decision in this particular case will be followed either by other state courts or by the Supreme

Court of the United States. The decision is referred to at length in another column of this issue, but the DOCKET cannot help feeling that it will take only one or two more judgments of this kind to make the demand for the recall of judges a popular and winning cry. The people will soon discover that a very much easier way than amending the constitution is to elect judges to the bench who will construe that constitution in the light of the twentieth century and modern social movements and not in the light of the seventeenth century and the conditions of that day. It is only the other day that the action of the Supreme Court of California seemed to indicate to the people that it was desiring to shield the malefactor Reuff from punishment for his crime, whereupon a resolution submitting the recall of the judiciary as a constitutional amendment to the people was adopted almost unanimously and will be voted upon next fall. In the last issue of this REVIEW, the DOCKET expressed an opinion against this attempt to destroy the independence of the judiciary, but he has no hesitancy in saying that the New York Court of Appeals in the decision referred to has done more to strengthen the movement for the Judicial recall than argument and agitation would have accomplished in twenty years.

THE Recall applied to the judiciary is intended to and would certainly destroy the independence of the judges, but for more than half a century in the framing of their state constitutions the people of nearly all the states have expressed their desire to weaken that independence as much as possible. Except in a few of the older states all of our judges are elected by the people for more or less brief terms and that there is no change of public opinion in this respect is shown by the fact that in the constitutional conventions of the last few years the appointment of judges with life terms has hardly been debated and would probably not have received a single vote. Yet the framers of the Federal constitution were of one mind in regard to this subject, the complete and absolute independence of the judiciary was with them a maxim and was hardly challenged by any one, and the provision in the Federal constitution in regard to the selection and tenure of the judges was agreed to without a dissenting voice. The same principle was embodied in all the constitutions of the original states and it was not until 1812 that Georgia, as Mr. Fiske puts it, "first set the pernicious example of electing judges for short terms by the people, a practice which is responsible for much of the degradation that the courts have suffered in many of our states and which will have to be abandoned before a proper administration of justice can be ever secured."

IN 1829 the great American Chief Justice, John Marshall, was a member of the Virginia Constitutional convention and one of the principal questions presented was the tenure by which the

judges should hold their office. The chief justice was then in his seventy-fifth year and for thirty years had been the nation's chief justiciar and this is what he had to say to the argument in favor of short elective terms: "The argument of the gentleman goes to prove not only that there is no such thing as judicial independence, but that there ought to be no such thing; that it is unwise and improvident to make the tenure of the judge's office to continue during good behavior. Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting—between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depend upon that fairness? The judicial department comes home in its effects to every man's fire-side; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent with nothing to control him but God and his conscience? . . . I acknowledge that in my judgment the whole good which may grow out of this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office. . . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."

IN HIS discussion and investigation of the feminine characteristics in his work on Criminal Psychology noticed in this issue of the REVIEW, Professor Gross finds that emotion controls the judgment of a woman—if criminals were left to women to be tried and punished they would kill them all in the first burst of anger, but if one waited until this burst had subsided they would release them all. But the professor is writing from the point of view of a German. This tendency which he ridicules is by no means a feminine trait in many parts of the United States. Is not this exactly what we see more particularly in our southern and southwestern country in the enforcement of the law against high crimes by male citizens and male jurors? In the first burst of excitement and indignation at a high crime, such as the murder or outrage of a woman, is it not the way even in respectable and old settled communities to clamor for the life of the accused; to storm the jail in which he is confined and to hang him to the nearest tree, or sometimes even to burn him at the stake. In the very city in which the DOCKET is now writing, it happened not very many years ago that a young negro charged with a criminal assault was taken from the hands of the officers of the law less than an hour after the crime was committed and hanged until he was dead from one of the front windows of the courthouse, his

body obscuring for the time these words, which were cut in stone on the front of the building, "Oh, Justice, when driven from other habitations make this thy dwelling place." Since then there have been many murders and other grave crimes committed by negroes in this community, but not one of them has lost his life through the judgment and execution of the law. This is history in many parts of the United States and nobody knows it better than the criminal lawyer defending a person accused of a great crime; for if he can only delay the final trial by continuances and appeals, he counts upon it that the miscreant whom the people would have hanged the day after the murder will be practically safe if sufficient time has elapsed to cause them to forget the enormity of the crime.

A VERY great part of the criminalist's work, says the same author, is nothing more than a battle against lies. He meets perjury and untruth at every step. The accused may have completely confessed the crime but after consulting a lawyer he will turn about and deny it most strenuously. To deny a charge made against one seems to be, at the present day, a well settled habit and it appears to be looked upon as somewhat of a disgrace to confess the most trivial fault. Every employer of labor will tell you that it is very rarely that a servant charged with not doing his duty properly in omitting something he should have done or in blundering in something he has tried to do will freely and unreservedly acknowledge it. The universal tendency is for him to deny it or excuse himself by throwing the blame upon somebody else. Look at the charges growing out of the Lorimer investigation in Illinois. Men of good standing in the community, bankers, lawyers, state senators and business men confess to an investigating committee that they have had certain dishonorable relations with legislators and other public men; but in every instance a flat denial is made to the charge. Now it may be that some of these indictments were untrue, but it does not stand to reason that all of them were so, and the fact that in every case the person whose conduct was impugned felt it incumbent upon him to deny the accusation shows a general feeling that a man is a fool who confesses to have done anything wrong. Perhaps one great cause of this general view is our peculiar method of demanding a trial on a charge of crime, namely: by the plea of not guilty. Everybody knows that the plea of not guilty means simply that the prisoner demands that his guilt shall be proved beyond a reasonable doubt, but this form and the presumption of innocence which our law has emphasized and proclaims so strongly have surely educated our people to the idea that in society as well as in the criminal courts everyone has a right to deny the truth of every charge and that in the one case as in the other such a denial is to be considered not as an untruth but simply as a challenge that the charge shall be proved.

IN THE opening chapter of his *Early Courts of Pennsylvania*, reviewed in this issue, Mr. Loyd points out how difficult it is for the modern American historian to obtain material for his work. In the few centuries of our civilization on this northern continent it is certainly not abundant, but the trouble is that so little has been preserved. The early settlers were "more bent on developing the resources and organizing the administration of the great territory that had come under their control, than preserving the records of their proceedings for the benefit of posterity, while their immediate descendants, living in an uncritical age and possessed with a passion for rhetoric to the exclusion of history, carelessly permitted the records of the preceding generation to be scattered or ruthlessly destroyed. Documents that would now be regarded as precious memorials of the past, and that would throw valuable light on our early institutions were used to feed the fires in the old courthouse."

OUR state historical societies are doing much to preserve records and other writings of this character. The low value that the early settlers of the east put upon official and other public papers is exactly the estimate which western communities for the past half century have placed upon such things, and the lawyer is as indifferent as the farmer, the storekeeper or the public official. The Missouri Bar Association is over thirty years old and its proceedings at its annual meetings through those years have been printed and issued to its members in book form. These twenty-seven volumes contain a mass of historical information,—papers read by the senior members of the bench and bar when the association was formed and discussions upon proposed changes in the law during that time. Yet how many sets of those proceedings could be found in the state? The DOCKET knows of but one complete set. He has been trying for five years to obtain one for his own library but has not succeeded, he still lacks the proceedings of one year. In response to a circular letter which he sent out two or three years ago to all the members of the association of that day, he received numerous replies, but not one copy of the proceedings. The response in almost every instance was, "I remember I had the things you want but I kept them with a lot of other pamphlets and when I moved my office I sent them to the junk shop."

THE Secretary of the Missouri Historical Society has had considerable experience in this line and the other day he told the DOCKET of numerous instances where old official publications stored in county courthouses have been deliberately burned up because they were in the way. At Troy, Lincoln County, he found several hundred volumes of Missouri publications running back to an early day, and containing much early history. They were in the attic of the courthouse without any pretense of being taken

care of. He paid a janitor to bring them where he could examine them, but the official in charge refused to let him take them to the State Historical library. He thereupon made a formal application to the county court to have the books turned over to the society, and requested an editor of one of the papers in Troy to assist him in the preservation of the books. He heard nothing for a year and on going back to the town to see what he could do he was told, that shortly after he left, the women of one of the churches in order to raise some money, asked the authorities that these books be given to them, which request was granted and with a lot of other papers which they had collected in the town, they were sent to a paper mill to be ground up. Through this wilful vandalism and extravagance the state loses documents of great historical and money value and the churchwomen add to their treasury the proceeds of a few pounds of waste paper.

THE DOCKET extends his sympathy to the Alabama Supreme Court judge who in a dissenting opinion, almost pathetic in its language, points out to the members of the bar of his state how it is that an appellate judge may sometimes assent to the decision of the court without really having mastered the case at all. In the particular instance the judge says, that after he had concurred in the opinion he read a criticism of the court's decision which satisfied him that it was wrong and he, therefore, asked his colleagues to rehear the case and on the rehearing he dissents from the majority judgment. Why did he not investigate the case on the first argument? Well the reason is this, he says: "Each judge has assigned to him four times as many cases as he can possibly investigate and write as should be done, especially if he understands the law after he investigates. Our system of pleading is like an exogenous plant, whose capacity for multiplying limbs is only limited by the climate and the fertility of the soil. It must be admitted that no system of pleading can ever be perfect in its operation and effect, as long as men are imperfect. And, if men were perfect, almost any system would do; but as long as morality lags behind intelligence, as long as men have more knowledge than virtue, we ought, in all things that pertain to our government, have that system which will give the greatest aid and comfort to these neglected children. What that system should be in this state could in my opinion best be devised after a most thorough investigation into the workings of the different systems of pleading of the different states and countries of civilization by a body of men most learned in the law and altruistic in character. It may be true that the common-law system had its snake heads; but it seems to me that in nearly every instance, where one has been cut off by our legislature, two or more have grown out to take its place. Under our present system one may plead as many pleas as he pleases; he may plead inconsistent pleas. The plaintiff may reply with as many replications as he pleases,

and with inconsistent replications, and so on. As to whether there shall be one or a thousand issues of law or fact depends upon the climate and the fertility of the soil. The only natural place for this process to stop, with counsel who understands his business, is when he has reached a point where he feels reasonably sure of a verdict or a reversal of the judgment.

"WE have also the written charge which counsel for either party may ask. In this if his vocabulary is large, his knowledge of the meaning of words accurate, and his imagination vivid, he may ask a dozen of such charges on each point of law involved in the case, each one stating the point correctly, but in different words; and he may also ask a dozen more on each point which states the law almost correctly. Supposing that there were only 100 issues, and only 12 written charges asked by each side upon each issue, there would still be 1,200 written charges to each side to be passed upon by the trial court. Suppose that 600 are given and 600 refused to each side, then there would be 1,200 to be reviewed by this court, besides the probability that the jury was too much instructed to understand the instruction. Do I object to the system? I cannot say that I do. While, as a citizen or a judge, I deplore it, yet as a lawyer and dialectician I rejoice in it. As a means for the administration of justice, its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon. I make this digression merely in explanation of my conduct in not having investigated sooner than I did, and to show why I made two guesses beforehand."¹

THIS cry from the bench for some reform in our methods of procedure comes at a good time and turns the attention of all of us to the difference in modern English criminal procedure in this respect. Under this system when the jury has found a verdict, the trial judge is through with the case; if the result reached is not correct, it is for the appellate court alone to say so, but in our American practice when for example a criminal is convicted, there follows immediately a motion for a new trial which sometimes takes a month to decide and the decision of the trial judge is never accepted. The prisoner's counsel intended to appeal from the beginning and why the case should not go direct from the trial to the appellate court is a mystery, explainable only by the one word "Delay." In an English court the case is over when the verdict is given and the judge immediately sentences the prisoner, it is then out of his hands entirely. If the

¹ 53 South. 340.

prisoner decides to appeal, he goes at once to the appellate court, where the only question is whether there has been on the trial a miscarriage of justice. The *DOCKET* recalls a trial of murder many years ago in a Missouri county where the defense was in the hands of a lawyer who boasted that none of his numerous client murderers had ever been hanged. But in this particular case the evidence was very strong and his efforts to mislead the jury and to work on their sympathies were unavailing for the twelve men on the jury returned a verdict of guilty. At this the prisoner broke down. What are you crying about, asked the amazed counsel? "Because the jury have found me guilty and I am going to be hanged," said the prisoner. "Dry up, you fool," retorted the lawyer, "that's nothing! the lawsuit has just begun." In other words where the English criminal trial ended, the Missouri trial had only gotten a fair start.

THE *DOCKET* has referred more than once to the well settled custom in the English courts that the judge shall deliver his judgment at once upon the case being submitted and not adjourn it even until the next day unless a special consultation on account of extraordinary difficulties is required. The English judge thinks it wrong to delay judgment and keep the parties in doubt and despair even for a day, but the American judge cares nothing for this; he will take his time no matter how much suffering and anxiety and uncertainty it may cause the parties in the case. When the case is argued in the supreme court even on a plain question of law, our appellate judges will scarcely ever announce their conclusion until the lapse of weeks and months. An English judge said to the *DOCKET* last summer, "Isn't it the best time to deliver your opinion when the evidence and the arguments of the counsel are fresh in your mind. I see the parties before me, I have heard the facts, I have listened to the arguments of the counsel; I think I know the law. Why should I not declare it and let the people who have come to me for a decision have it at once without wasting even a night in uncertainty and doubt." "I really don't see," added the judge, "how your judges can remember the points made by counsel when they come to render judgment weeks after the argument." "They don't," replied the *DOCKET*.

THE common law doctrine of contributory negligence seems to be stretched to its limit by the supreme court of Michigan in a recent case. The employees of a telephone company in making an excavation in a street had negligently removed a part of a large city water main in consequence of which a quantity of water escaped and was forced into the second story of a building into a room occupied by a women's athletic association. The plaintiff, who was housekeeper and caretaker of the house at-

tempted to close the window to prevent the water from coming in, but the force was so great as to knock her down, drench her with water, and make her ill. In an action for damages, the supreme court rules that there can be no recovery, because she voluntarily closed the window and assumed the consequences of the risk she took. The court says that the voluntary attempt to close the window was unnecessarily assuming a peril; but can it be that one who is in charge of property and whose duty it is to do the best to save it from injury is unnecessarily assuming a peril in endeavoring to prevent a loss to his employer? An emergency confronts a person, he can be a coward and run away or he can do what he believes to be his clear duty in his master's service. Can it be that the law puts a premium on unfaithfulness and cowardice and proclaims to every one who is engaged in a service of any kind that he must not endeavor to guard his master's interests because forsooth he may run a chance of being hurt in the endeavor? That between the negligent doer of an act which does injury to another's person or property and the faithful servant who is doing his best to guard his master's property, the law should favor the former at the expense of the latter is hardly creditable to the law.²

THE DOCKET has more than once resented the demand made by the messenger in delivering a paid telegram for a dime or other small sum which the boy alleges is the charge for delivery. He has usually refused to pay it and the boy has gone away grumbling. This petty exaction on the part of the telegraph company generally succeeds, as the receiver is anxious to know what the message is, and the sum being small, pays it without disputing it. But it is a species of petty larceny which great corporations are accustomed to commit upon the individual and it is with some satisfaction therefore that one reads of a recent case in Alabama where but for this the company would have succeeded in the suit. A telegram (charges paid) had been sent to the plaintiff telling him that his father was dead and asking him to come on the first train. The company not only delayed the delivery of it to him but when they did deliver, the boy demanded a fee for delivery, which the plaintiff paid. When he sued for damages for mental suffering in not being able to attend the funeral, the supreme court held that there could be no recovery for mental suffering alone, unaccompanied by an injury to his person, reputation or estate. But as the company had no right to charge for delivery of a paid telegram, the sum paid to the boy was recoverable, and constituted a basis for recovery, likewise, for mental suffering caused by the delay.³

² Taylor v. Home Tel. Co., 128 N. W. 728.

IN TRUTH very few of the annoying exactions of public service corporations are so devoid of even a color of right as this particular one. The person to whom a telegram is addressed has not employed the company, nor has he made any contract with it, nor is it material whether the charges on the message are paid or not. When A writes out his message to B on the blank and gives it to the telegraph operator or clerk and pays the charge, the company has agreed to deliver it to B for the sum paid or for an additional sum if B is beyond the usual delivery limits, which A is presumed to agree to pay. If a telegram is handed to B by the company's agent, B does not by opening the envelope and reading it, agree to pay anything for the privilege, for until he has read its contents he is unable to say whether it is of any value to him or not. The DOCKET, the other day, was handed a telegram by a messenger which contained the following inquiry from a perfect stranger: "Is there a vacancy in your office?" Now it will hardly be argued that the DOCKET was obligated to pay the charges, which had not been paid by the sender. The sender is the one who in all cases promises to pay not only the ordinary charges, but any additional ones which may be made at the place where the message is received, if it happens that the person addressed lives beyond the ordinary limits. It is in every case the sender who is liable for everything connected with the service and if the company does not choose to collect the charges in advance, it does not become entitled to demand and collect them of the receiver. But as it is easy generally to collect a small fee of a dime or so from the receiver who does not ordinarily know his rights, a great corporation like one of the national telegraph companies is daily and hourly perpetrating a fraud, which in the case of an individual would render him liable to an indictment either for larceny or for obtaining money by false pretenses.

Western Union Tel. Co. v. Jackson, 50 South. 316.

BOOK REVIEWS.

COMMENTARIES ON THE LAW IN SHAKESPEARE.—By EDWARD J. WHITE, Author of "Mines and Mining Remedies"; "Personal Injuries in Mines"; "Personal Injuries on Railroads," etc., etc. St. Louis: F. H. Thomas Book Co. 1911.

The never-waning interest in Shakespeare's works and character, and curiosity about his history and personality, continue to rivet the attention of scholars and evoke research and criticism, some of which, at least, is helpful in studying the plays, and some even adds to what we know of his character and the events of his life. The laborious researches of Professor Wallace among the ancient records and files of the courts of Westminster Hall brought to light incidents of Shakespeare's course of life in London, which give him a local habitation there, and afford a brief but vivid glimpse of the man in his everyday relations with friends and neighbors.

In an interesting work, Mr. Frank Harris has endeavored to show that Shakespeare, instead of hiding his true nature behind dramas and poems of an impersonal quality, as is commonly believed, really depicted himself in many of the characters in the plays, and attributed to them emotions which were excited in him by his personal experiences. This author conceives of Shakespeare as a Hamlet-like nature, prone to think rather than act, and to brood in a skeptical and melancholy mood over the enigmas of life and death—which probably is the right view of Shakespeare's inner self, though we know from his boon companions that in manner he was bland and affable. Mr. Harris' elaborate argument is full of information about Shakespeare, and assists one greatly to realize the man, but is far from convincing in respect of the main theses the author aims to prove, that Shakespeare was improvident and debauched, detested his wife, and suffered "soul-wreck" from being jilted by Mary Fitton.

The present volume by Mr. White is a scholarly and judicious effort to demonstrate Shakespeare's knowledge of the laws of England from the use of legal terms and references to legal rules in his works; the same subject previously treated by Senator Cushman K. Davis, but, as we remember, less exhaustively. Mr. White has excerpted from each of Shakespeare's writings, in the order in which they appear in the published editions, beginning with "The Tempest" and ending with the Sonnets, every word and sentence (to the number of 511) that have technical significance in jurisprudence. In many instances, these passages have no tendency to prove Shakespeare was a lawyer and acquired the law's terminology in the course of professional studies, for obviously their use implies only such knowledge as any citizen of average intelligence would possess, or else they are used in a vernacular and not in a legal sense. For instance, in section 76, the quotation is:

"To fast—to study—and to see no woman.
Flat treason 'gainst the kingly state of youth."

"Treason" of course has a technical meaning when used as a legal term, but there is nothing in that passage to show that Shakespeare so used it.

The word is simply employed as any person might employ it in conversation or writing. And, again, we find this quotation in section 21:

"We must not make a scarecrow of the law
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror,"

The word "custom" does not there bear the juridical meaning of the ripening of general usage into a law, but signifies merely habit and familiarity. And in section 72, the word "receipt" means no more than it does in common speech.

Nevertheless, numerous passages remain where it is plain Shakespeare employed a legal term in its strict technical sense, and with full appreciation of what that sense was. In section 9 the following is taken from the "Merry Wives of Windsor":

"*Mrs. Page.* The spirit of wantonness is sure scared out of him; if the devil have him not in fee-simple, with fine and recovery, he will never, I think, in the way of waste, attempt us again."

A lawyer can not doubt that Shakespeare used the terms "fee simple," "fine and recovery," and "waste" in their purely technical meanings, understanding perfectly what those meanings were. The same is true of the employment of the words "acquittances" and "specialties," in section 73, and the word "exception" in the passage quoted from "Othello" on page 34, where Iago says to Roderigo: "Give me thy hand, Roderigo: thou hast taken against me, a most just exception."

Many other examples to the same effect might be cited from Mr. White's book; and it is difficult for a lawyer to believe that Shakespeare had not at some period of his life devoted special attention to the laws of his country, and frequented courts, either with a view to preparing himself for that profession, or perhaps as clerk to some lawyer or magistrate.

Yet stronger evidence of his familiarity with legal terms is the manner in which he plays on them, for to do this successfully argues, if not the habitual use of them, at least very accurate knowledge of their meanings. In section 23, the characters are made, for purposes of humor, to employ law terms in an absurdly erroneous way:

"*Elb.* Prove this, thou wicked Hannibal, or I'll have mine action of battery on thee.

"*Escal.* If he took you a box o' the ear, you might have your action of slander too."

The same is true in the following passage from *Love's Labours Lost*:

"In manner and form following, sir; all those three: I was seen with her in the manor house, sitting with her upon the form and taken following her into the park; which, put together is, in manner and form following."

And still more is it true in the succeeding section, 65, quoted from that play, which is too long to copy here; and also in this excerpt from the same play:

"*Mar.* Not so, gentle beast;
My lips are no common, though several they be."

It is quite plain Shakespeare's acquaintance with English law and its peculiar forms of expression would not have been acquired, even by a person of his intellect, without special study of the subject at some time; and the theory of Lord Bacon's authorship of the plays naturally occurs to one in reading this book, wherein the frequent and apt employment of law terms is made conspicuous. We are gratified to note that Mr. White's researches, instead of making a Baconian of him, have caused him to reject that heresy. Bacon was one of the profoundest and most erudite lawyers who ever lived; but Shakespeare, while he displayed a knowledge of legal rules and phrases that demonstrates some degree of special study of the law, does not exhibit that accuracy in the use of terms and statement of rules that would be expected from Bacon. In truth, he frequently blunders in this regard, as occasionally he did in the geography of his plays. For example, Bacon would hardly have employed the word "plea" as Shakespeare did in describing Shylock's demand for the enforcement of his bond. (Sec. 84.) Nor would he have treated Bassanio's tender of the amount of the bond in open court as of no effect. In fact, one can not think of Bacon depicting such a court scene as we have in the Merchant of Venice, or indulging in the puerile reasoning resorted to by Portia to evade the suit of Shylock: a scene and a legal doctrine that have always been repudiated by lawyers as unreal and unsound; the same remarks are applicable to the trial of Sir John Falstaff. In truth, men of the bar are constantly impressed by the absurdity of judicial proceedings as represented on the stage, and Shakespeare's court scenes are as little true to reality as those of other dramatists; and, on the whole, Shakespeare's employment of legal phrases and representations of proceedings in court, are beyond doubt those of an amateur instead of a master, and, properly regarded, they argue against, instead of for, the Baconian theory. Is it to be supposed that, if Bacon wrote the dramas, he would have exhibited less knowledge of the terms and procedure of jurisprudence, his own especial domain, than he did of human nature and philosophy?

It is a pleasure to find verses which imply that Shakespeare had both a relish and a reverence for law, and realized that its influence for order is dependent on consistently enforcing it. (Secs. 20, 32.)

Mr. White's book is interesting and instructive: interesting because it sheds a bright light on one facet of Shakespeare's many-sided genius, and instructive because of the learning and scholarly research shown in the notes; because, too, the notes greatly assist the ordinary reader to understand the quoted lines; and, moreover, are a concordance to all the passages in Shakespeare that contain allusions to rules and terms of the common law. Evidently much care has been bestowed on the work; for the annotations are enriched with a mass of historical information about the customs and institutions of England gleaned from authentic sources; for examples, read the commentaries on section 191, relating to trial by battle, and on the right to sanctuary, discussed in section 311.

Much as we may admire the perfect poetry of the plays and the varieties of character portrayed, ranging from peasant to king, and including the

imaginary beings of other spheres, elves, fairies, witches, ghosts, Calibans, and Pucks, we do not fully appreciate Shakespeare until we realize that his keen human interest had caused him to acquire an intimate knowledge of the positive, everyday affairs of men. Those affairs are closely associated with the law of the land, and the Commentaries of Mr. White make clear the fact that Shakespeare's interest in the law was such as a great mind, prone to study the various phases of life, would naturally feel.

THE EARLY COURTS OF PENNSYLVANIA.—By WILLIAM H. LOYD, of the Philadelphia Bar; Gowen Fellow in the Law School of the University of Pennsylvania. Boston: The Boston Book Co. 1910.

The first settlements in the territory now included in the State of Pennsylvania were those of the Swedes and the Dutch and the first courts of justice were established by them. Dutch rule and Dutch laws came to an end, however, in 1664, when Charles II granted to his brother, the Duke of York, afterwards James II, this territory. King James' charter established no courts but gave to the duke full power to correct, punish, pardon and rule all the inhabitants according to laws as he himself should establish which were not contrary to the laws of England, reserving to the Crown the right to hear appeals. The duke's governor, however, continued in his service the Dutch and Swedish magistrates, but English jurisprudence had become established, and both the common law and many statutes of England were taken by the judges as being in force at once. Seventeen years later the province of Pennsylvania was granted by Charles II to William Penn. He arrived at New Castle in October, 1682, and one of his first acts was to appoint six justices of the peace and before the end of the year the province had been divided by him into six counties and courts established in all of them.

In the trial of cases the procedure was characteristically simple. If the plaintiff failed to serve his process he was non-suited; if the defendant failed to appear judgment was entered against him. If both parties were present the defendant was called on for his answer, which could set up any defense legal or equitable or claim a set-off. The law required the pleadings to be short and in English. The parties would sometimes leave the case to the bench without a jury, particularly in the lower counties, but if a jury was called, it consisted invariably of twelve men. After verdict judgment was entered and the practice survived for some time of entering judgments in kind—perhaps reaching a climax in an entry of judgment for "one thousand of six-penny nails, and three bottles of rum." In criminal cases the sentences were usually limited to fines, whipping, or the stocks. The colonists could not spare the labor of the criminal, nor did they wish to support him in idleness; hence a sentence of imprisonment was rare. But for high crimes, the bloody sentences of England of that day seem still to have been followed. In 1731 an execution took place at New Castle which, it is to be hoped, says the author, was sensational in the annals of the colonies. Catherine Bevan, together with a servant named Peter Murphy, were indicted, tried and found guilty of the murder of the woman's husband, Henry Bevan.

The conviction would seem to have been obtained principally upon the confession of the servant. By the common law at that time the murder of a husband by his wife was petit treason, and the punishment was to be drawn and burnt. Accordingly, on September 10, 1731, the man was hanged and the woman burnt pursuant to their sentences. A gruesome account of the affair appears in Franklin's "Pennsylvania Gazette" for September 23, 1731:

"She denied to the last that she acted any part in the murder and could scarce be brought to own that she was guilty of consenting. Neither of them said much at the place of the execution. The man seemed penitent, but the woman appeared hardened. It was designed to strangle her dead before the fire could touch her; but its first breaking out was in a stream which pointed directly upon the rope that went round her neck, and burnt it off instantly so that she fell alive into the flames, and was seen to struggle."

This is almost an exact reproduction of the sentence and execution of Catherine Hayes for the same kind of crime which was carried out at Tyburn in the year 1720. (See 44 Am. L. Rev. 465.)

In 1776 comes on the outbreak of the colonists and the appearance docket of the court for the April term of that year contains the following entry:

"At a Supreme Court held at Philadelphia for the Province of Pennsylvania the tenth day of April, in the sixteenth year of the reign of our Sovereign Lord George the Third, King of Great Britain, Ireland and France, Defender of the Faith, etc., and in the year of our Lord one thousand seven hundred and seventy-six; and continued by adjournment until——" Until when? says the author. Doomsday, no doubt; for this was the last court held under our "Sovereign Lord George," and the date of continuance was never filled in.

A convention called in July, 1776, and presided over by Franklin, drew up a constitution which was adopted and under which Penn's charter was discarded and new officers were appointed and elected. This constitution lasted only fourteen years, but it provided for a Supreme Court, courts of sessions, common pleas and orphans' courts. In 1790 a new constitution was adopted with life tenure in the judges and the grouping of the counties into judicial circuits, and this document seems to have been the fundamental law of the state with amendments at certain times until the adoption of the constitution of 1874.

Mr. Loyd gives an interesting account of the struggle for the defeat of courts of equity. He says: "One of the most troublesome questions with which the colonial administrator had to deal was equity jurisprudence. In the early years of the seventeenth century politics entered into the contest for jurisdiction between the English court of chancery and the courts of common law, beclouding the issues and retarding a settlement of their respective spheres of action. Popular dislike pictured the chancellorship as a great political office closely identified with the Crown, and grudgingly admitted its importance in the complex judicial system of England." Another obstacle to the introduction of equity jurisprudence

was the primitive social conditions that prevailed in the sparsely populated settlements. There was sufficient difficulty in the conduct of an ordinary lawsuit in the local courts without adding to the embarrassment of the magistracy by requiring them to solve the mysteries of the unreformed chancery pleading and practice. The colonial judge of the seventeenth and eighteenth centuries was in knowledge and training about on a par with the English justice of the peace and it would have been preposterous to expect the former to undertake the office of chancellor as to impose similar duties on the English quarter sessions. When, in the eighteenth century, trained lawyers began to make their influence felt in the colonies disputes and misunderstandings between the assemblies and the governors prevented the creation of or retarded the growth of the courts of chancery, resulting in a conflict of principles and practice in the several provinces far too intricate to be briefly described. In *Wharton v. Morris*, Chief Justice McKean, in charging the jury on the question as to whether a bond payable in lawful current money of Pennsylvania could be paid in depreciated currency, remarked that "The want of a court with equitable powers, like those of the chancery of England, had long been felt in Pennsylvania. The institution of such a court," he observed, "had once been agitated here, but the houses of assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of increasing, by that means, the power and influence of the governor, who claimed it as a right to be chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, etc. This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question to the jury, under an equitable and conscientious interpretation of the agreement of the parties."

The committee that drafted the constitution of 1766, at the head of which was James Wilson, recommended the establishment of a high court of chancery, but the convention refused it. So ended, says the author, the last effort to obtain a separate court of chancery in Pennsylvania. This much was conceded, the legislature was authorized not only to extend the equity powers of the existing courts, but to vest them in such other courts as they should judge proper. But the latter power was not exercised by the creation of a separate court, nor were equity powers conferred upon the ordinary courts in a systematic manner. From time to time, under the compulsion of sheer necessity, equitable jurisdiction was extended by a series of acts, the mere recital of which is wearisome. Delaware, however, whose political and judicial history was so long and so intimately associated with that of Pennsylvania, took the step declined by her sister commonwealth and established a separate court of chancery by the constitution of June 12, 1792.

The work, though it covers but a small portion of our judicial history, is one to be commended. It is the result of research work in the Law School of the University of Pennsylvania, and is the outcome of a series of lectures delivered in that institution.

INDEX ANALYSIS OF THE FEDERAL STATUTES.—(General and permanent law (1789-1873. Together with a Table of Repeals and Amendments, Washington: Government Printing Office. 1911.

Macaulay describes index making as the first step on the ladder of literature and somebody has laid it down that a book without an index would be nearly as useless as an index without a book. This great volume of 1200 great pages is a preliminary volume to Scott and Beaman's Index Analysis from 1873 to 1897, and was compiled under the direction of the Librarian of Congress by the law staff of the Congressional Library, headed by Mr. Middleton, C. Beaman and Miss A. K. McNamara—the writer of the article on The Constitutionality of the Federal Parole Law in this issue.

Though the book is a public document, it is not distributed gratuitously but can only be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., at the nominal price of \$2.25 per volume.

THE LAWS OF ENGLAND.—A complete statement of the whole law of England. By the RIGHT HONOURABLE, THE EARL OF HALSBURY, Lord High Chancellor of Great Britain, 1885-1886, 1886-1892 and 1895-1905, and other lawyers. Vol. XIV. Philadelphia: Cromarty Law Book Co. 1910.

The fourteenth volume of this well known digest-commentary of the laws of England contains the titles: Execution, Executors, Explosives, Extradition, Ferries, Factories, Family Arrangements, and Fisheries. All of these subjects are everyday subjects of discussion and adjudication in our American courts and we repeat here what we have said before that the present compilation offers to the American lawyer the best and most complete synopsis extant of the laws of England.

A TREATISE ON FEDERAL CRIMINAL LAW AND PROCEDURE WITH FORMS OF INDICTMENT.—By WILLIAM H. ATWELL, U. S. Attorney, Texas. Chicago: T. H. Flood & Co. 1911.

This is a very well written treatise, not expanded by numerous quotations and citations of the Federal law, on Federal Crimes and Federal Procedure. It is written by a United States District Attorney whose experience in such matters adds authority to his statements. It will be a valuable and convenient hand-book for the criminal practitioner in the Federal courts, and until the coming in of the new Federal criminal code in January next year it will be an accurate statement of the Federal criminal practice.

MODERN THEORIES OF CRIMINALITY.—By C. BERNALDO DE QUIROS, of Madrid. Translated from the Second Spanish Edition by DR. ALPHONSO DE SALVIO, Assistant Professor of Romance Languages in Northwestern University. With an American preface by the author, and an introduction by W. W. SMITHERS, Esq., of Philadelphia. Boston: Little, Brown & Co. 1911.

The American Institute of Criminal Law and Criminology is doing more than investigate systems of criminal procedure in other countries for the purpose of comparison with our own, it is also engaged in bringing to the American lawyer and American student of social affairs the great works of foreign writers on criminal law and criminology, which, on account of being written in foreign languages are open to few who might desire

to study them. Deeming it desirable that important treatises in foreign languages should be accessible in the English tongue, the president of the Association shortly after its organization appointed a committee to select such treatises as in its judgment should be translated and to arrange for their publication. That committee has in two years brought about the translation and editing in this country of nine valuable treatises of this character and the treatise on Modern Theories of Criminology is the first to be issued.

The author, Bernaldo DeQuiros, is a Spaniard and a leading Spanish writer on criminology. His book now presented for the first time in the English language, is a complete compendium of the subject, giving, as it does, a concise survey of all the European writers on criminal science.

It might almost be described as the index to the writings on criminology, but were it only this its place would be at the end rather than at the beginning of this modern criminal science series. On the contrary, it not only reveals all the shades of thought which have marked the development of this science, but it distinguishes between the different theories and draws deductions from the controversies of different criminal jurists.

The work of the Institute of Criminal Law and Criminology in this direction is one to be greatly commended. As is said by the committee in its general introduction to the series: "Study by experiment and comparison in the domain of crime and criminals before the law is demanded in this day and generation. All this has been going on in Europe for forty years past, and in limited fields in this country. All the branches of science that can help have been working—anthropology, medicine, psychology, economics, sociology, philanthropy, penology. The law alone has abstained. The science of law is the one to be served by all this. But the public in general and the legal profession in particular have remained either ignorant of the entire subject or indifferent to the entire scientific movement. And this ignorance or indifference has blocked the way to progress in administration. The Institute, therefore, takes upon itself, as one of its aims, to inculcate the study of modern criminal science, as a pressing duty for the legal profession and for the thoughtful community at large. One of its principal modes of stimulating and aiding this study is to make available in the English language the most useful treatises now extant in the continental languages. Our country has started late. There is much to catch up with, in the results reached elsewhere. We shall, to be sure, profit by the long period of argument and theorizing and experimentation which European thinkers and workers have passed through. But to reap that profit, the results of their experience must be made accessible in the English language."

CRIMINAL PSYCHOLOGY.—By HANS GROSS. Translated from the Fourth German Edition by DR. HORACE M. KALLEN, Lecturer in Philosophy in Harvard University. With an American preface by the author, and an introduction by JOSEPH JASTROW, Professor of Psychology in the University of Wisconsin. Boston: Little, Brown & Co. 1911.

But the second work to be translated and published by the committee of the American Institute of Criminal Law and Criminology will appeal to a much wider circle of readers and investigators than the Spanish

treatise on Modern Theories of Criminality. Professor Gross' Criminal Psychology is well described on the title page as a manual for judges, practitioners, and lawyers and a careful examination of the book has convinced us that no work not strictly a law book which has appeared in the United States for a long time will be of more assistance to the criminal lawyer and to the criminal practitioner than the one before us. It is certainly a reproach to our system of criminal trials that any person engaged in the inquisition, be he counsel or judge, and charged with the solemn duty of passing on the question of the guilt or innocence of one indicted for a crime should not, as a rule, be in touch with what the scholars of the world have contributed to this important phase of human affairs and of civil government. The Institute in opening this learning to the American lawyer and to the American judge is rendering a distinct service to justice and to humanity.

We cannot help taking a cursory run through the 500 pages of this volume and quoting here and there the author's views on matters of striking interest and of everyday concern.

The author does not give much value as a truthful example of feeling to the tears of a woman and as with tears so he says it is with fainting. The greater number of fainting fits are either altogether false, or something between fainting and wakefulness. Women certainly, whether as prisoners or witnesses, are often very uncomfortable in court and this may result in a natural fainting fit, but although it is wrong to assume beforehand that all fainting fits are comedies under these circumstances, the author points out that at all times it is necessary to beware of deception. Concerning the lack of judgment of a woman, he thinks that their emotions control them in this respect and quotes from an old author to the effect that, "If criminals were left to women to be tried and punished they would kill them all in the first burst of anger, and if one waited until this burst had subsided they would release them all."

Our author has this to say of feminine honesty:

"Not to be honest, and to lie, are two different things; the latter is positive, the former negative, the dishonest person does not tell the truth, the liar tells the untruth. It is dishonest to suppress a portion of the truth, to lead others into mistakes, to fail to justify appearances, and to make use of appearances. The dishonest person may not have said a single untrue word and still have introduced more difficulties, confusions and deceptions than the liar. He is for this reason more dangerous than the latter. Also, because his conduct is more difficult to uncover and because he is more difficult to conquer than the liar. Dishonesty is, however, a specially feminine characteristic, and in men occurs only when they are effeminate. Real manliness and dishonesty are concepts which cannot be united. Hence, the popular proverb says, "Women always tell the truth, but not the whole truth." And this is more accurate than the accusation of many writers, that women lie. I do not believe that the criminal courts can verify the latter accusation. I do not mean that women never lie—they lie enough—but they do not lie more than men do, and none of us would attribute lying to women as a sexual trait. To do so, would be to confuse dishonesty with lying."

Many people will recognize this picture:

"The fact is, that woman does not know the definite line between right and wrong. Or better, she draws the line in a different way; sometimes

more sharply, but in the main more broadly than man, and in many cases she does not at all understand that certain distinctions are not permitted. This occurs chiefly where the boundaries are really unstable, or where it is not easy to understand the personality of the sufferer. Hence, it is always difficult to make woman understand that state, community, or other public weal, must in and for themselves be sacred against all harm. The most honest and pious woman is not only without conscience with regard to dodging the taxes, she also finds great pleasure in having done so successfully. It does not matter what it is she smuggles, she is glad to smuggle successfully, but smuggling is not, as might be supposed, a sport for women, though women need more nervous excitement and sport than men. Their attitude shows that they are really unable to see that they are running into danger because they are violating the law. When you tell them that the state is justified in forbidding smuggling, they always answer that they have smuggled such a very little that nobody would miss the duties.

"Women, moreover, do not understand the least regulation. I frequently have had cases in which even intelligent women could not see why it was wrong to make a "small" change in a public register; why it was wrong to give, in a foreign city, a false name at the hotel; or why the police might forbid the shaking of dust-cloths over the heads of pedestrians, even from her 'own' house; why the dog must be kept chained; and what good such 'vexations' could do anyway. Again, tiny bits of private property are not safe from women. Note how impossible it is to make women understand that private property is despoiled when flowers or fruit are plucked from a private garden. The point is so small, and as a rule, the property owner makes no objections, but it must be granted that he has the right to do so. Then their tendency to steal, in the country, bits of ground and boundaries is well known. Most of the boundary cases we have involved the activity of some woman.

"Even in their own homes women do not conceive property too rigidly. They appropriate pen, paper, pencils, clothes, etc., without having any idea of replacing what they have taken away. This may be confirmed by anybody whose desk is not habitually sacrosanct, and he will agree that it is not slovenliness, but defective sense of property that causes women to do this, for even the most consummate housekeepers do so. This defective property-sense is most clearly shown in the notorious fact that women cheat at cards. Croupiers in gambling halls know things much worse. They say they must watch women much more than men because they are not only more frequent cheaters, but more expert. Even at croquet and lawn tennis girls are unspeakably smart about cheating if they can thereby put their masculine opponents impudently at a disadvantage."

Concerning the accuracy of representation in children, authorities, Dr. Gross says, are contradictory. Montaigne says that all children lie and are obstinate. Bourdin corroborates him. Maudsley says that children often have illusions which seem to them indubitably real images, and Mittermaier says that they are superficial and have youthful fancies. Experience in practice does not confirm this judgment. The much experienced Herder repeatedly prizes children as born physiognomists, and Soden values the disinterestedness of children very highly. According to Lobisch, children tell untruths without lying. They say only what they have in mind, but they do not know and care very little whether their mental content is objective and exists outside of them, or whether only half real and the rest fanciful. This is confirmed by legal experience which shows us, also, that the subjective half of a child's story may be

easily identified. It is characteristically different from the real event and confusion of the two is impossible.

One cannot refrain from quoting this delightful comment from an author cited by Dr. Gross, it sums up so well the different treatment received in our courts by the poor fellow who not having where to lay his head, goes to sleep in an empty railroad car and is promptly sent to prison for trespass and the railroad president or board of directors who order their employes to take possession of the city street or crossing, without authority and are able to fight it out in the courts for years with no thought of any criminal process against the men who deliberately ordered the trespass, but with a feeling akin to triumph if at the end the people are able to hold their property against the great marauder. "It is scandalous to empty a purse, it is impertinent to misappropriate a million, but it is unnamably great to steal a crown. The shame decreases with the increase of the crime."

Dress as an indication of character is discussed in a way to impress the reader and make him readily understand how thorough and extensive the author's observations have been.

"It is easy to write a book on the significance of a man's clothes as the expression of his inner state. It is said that the character of a woman is to be known from her shoe, but actually the matter reaches far beyond the shoe, to every bit of clothing, whether of one sex or the other. The penologist has more opportunity than any one else to observe how people dress, to take notes concerning the wearer, and finally to correct his impressions by means of the examination. In this matter one may lay down certain axioms. If we see a man whose coat is so patched that the original material is no longer visible but the coat nowhere shows a hole, if his shirt is made of the very coarsest and equally patched material but is clean, and if his shoes are very bad but are whole and well polished, we should consider him and his wife honest people, without ever making an error. We certainly see very little wisdom in our modern painfully attired 'sports'; we suspect the suggestively dressed woman of some little disloyalty to her husband, and we certainly expect no low inclinations from the lady dressed with intelligent, simple respectability. If a man's general appearance is correct it indicates refinement and attention to particular things."

Professor Gross was born in 1847, in Austria, pursued his university studies at Vienna and Graz, and qualified for the law in 1869. He served as "Untersuchungsrichter" (examining magistrate) and in other capacities, and received his first academic appointment as professor of criminal law at the University of Czernowitz. He was later attached to the German University at Prague, and is now professor in the University of Graz. He is the author of a number of volumes bearing on the administration of criminal law and upon the theoretical foundations of the science of criminology. In 1893 he issued his "Handbuch für Untersuchungsrichter, als System der Kriminalistik," a work that reached its fifth edition in 1908, and has been translated into eight foreign languages.

Since 1898 he has been the editor of the "Archiv für Kriminalanthropologie und Kriminalistik," of which about twenty volumes have appeared. At the University of Graz he has established a Museum of Criminology.

The succeeding volumes of this important and valuable enterprise will be eagerly awaited by everyone who has read the two already published.

THE VISIGOTHIC CODE.—Translated from the original Latin, and edited by S. P. SCOTT, member of the Comparative Law Bureau of the American Bar Association. Boston: The Boston Book Company, 1910.

This important legal historical document appears for the first time in English form under the auspices of the Comparative Law Bureau of the American Bar Association. The translating and editing have been done by Mr. S. P. Scott, a member of the Bureau, and the author of an ambitious work on the "History of the Moorish Empire in Europe." A careful examination of the translation and an equally careful reading of Mr. Scott's somewhat lengthy and wordy preface show clearly that while the translating has been fairly well done, the editing might easily have been entrusted to more competent and critical hands. The preface is of little historical or legal value as an introduction to the Code: the notes are few and far between and it is evident that the editorial task has been lightly undertaken. No history of earlier Visigothic legislation is given, there are no references to discussions of the value of the code, and no critical or scholarly commentaries. It would be well for American editors of legal and historical documents to take a lesson from the excellent prefaces, introductions and notes found in the publications of the Selden Society, and in the great series of Chronicles and Memorials published by the British Government. Surely American readers are entitled to some account of the manuscripts of the *Forum Judicum* and some critical discussion of its legal and historical background, and these have not been furnished in the present instance.

The Visigoths were the first barbarian people to establish themselves in the territory of the Roman Empire. From their first settlement in the eastern half of the empire they migrated early in the fifth century to southern Gaul and Spain. There they founded a strong kingdom, but could not withstand the Franks and, in the early sixth century, Visigothic power became confined to Spain. The beginnings of Visigothic Roman legislation are connected with the names of two kings of the later fifth century, Euric and Alaric II. It was in 506 A. D. that Alaric II published the *Lex Romana Visigothorum*, or Breviary, to supplant all older law among his Roman subjects. The substance of the code was Theodosian, though other influences and sources can be traced, especially some of the *Sententiae* of Paulus and the *Institutes* of Gaius. There was a running commentary or *interpretatio*, probably furnished by poorly educated and degenerate Roman lawyers. Poor as it is, this code is of great importance in that it greatly influenced the Franks, who took it over with their conquest of southern Gaul. It has been well edited by the German jurist Hänel. In Spain the Breviary of Alaric was soon supplanted as a code of Roman law by a more national collection of laws applicable to both Goths and Romans. The beginnings of this *Lex Visigothorum* can be traced to the national edicts of King Recared at the time of his conversion from Arianism to Catholicism, at the third council of Toledo in 589. The uniting of the Roman Church and the Gothic monarchy naturally tended to create a body of national legislation applicable to Goths and Romans alike, Roman in form, and largely in spirit, and showing

the influence of a strong church. The body of national law grew steadily during the next century, especially under King Chindaswinth (642-652), who abolished conflicting enactments and made the *Lex Visigothorum* a definite thing. Under Chindaswinth's son, King Receswinth (652-672), the code or *Forum Judicum*, was officially promulgated and strictly enforced. Subsequent revisions and additions were made by King Erwig in 682 and, in the last days of Gothic rule, by King Egica (687-701), but the mass of the laws belong to the period of Chindaswinth and Receswinth.

The present English translation of the *Lex Visigothorum* is from the edition of the Royal Spanish Academy, published in 1815. The code is organized into twelve books, of which the first two are introductory, relating to legal agencies and the conduct of cases or procedure. Books III-V have to do with civil and private relations under the general heads of Marriage, Natural Lineage and Inheritance, and Business Transactions. Books VI-VIII treat of Crimes and their punishments. Book IX has to do with offences against the state, under the head of Fugitives and Refugees, while Books X-XI relate to questions of public order and decency, and the treatment of foreign merchants. The last book is largely devoted to severe legislation, looking towards the suppression of the Jews or their conversion, though it bears the imposing title, "Concerning the Prevention of Official Oppression, and the Thorough Extinction of Heretical Sects." As a whole, the code impresses one as being what it has well been called by an eminent legal writer, "a verbose and futile imitation of Roman codes." While interesting as a Christianized adaptation of Roman law, it has exercised no such influence on European law of later times as Mr. Scott attributes to it. Its real importance is confined to Spain and the Spanish colonies, and even in this connection it has been so greatly changed and modified that only a few resemblances remain and these not of the best sort. It must be remembered that the Visigothic Code was the law of a decadent, theocratic state and practically went out of existence as a national code. When it was revived for national purposes it had become archaic and has been so greatly changed and modified that the original code is more of a legal curiosity than a document of vital significance.

The publishers of this edition of the Visigothic Code deserve praise for the attractive mechanical form in which the work has been brought out. The proof reading has been carefully done and the book will make a handsome addition to any lawyer's library. There is a serviceable index of matters treated in the code and many interesting analogies with modern legal forms and usages can be found by inquiring students. It is to be hoped that other collections of laws will be brought out by the Bureau of Comparative Law, but care should be exercised to select editors who are fully competent, both legally and historically.

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- BABBITT, C. T. *Law of Motor Vehicles*. John Byrne & Co., Washington, D. C.
- STIMSON, F. J. *Law Dictionary*. Little, Brown & Co., Boston.
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All communications for the editor should be sent to

JOHN D. LAWSON,
14 South Broadway,
St. Louis, Mo.



THE HISTORY OF

THE

REIGN OF

CHARLES THE FIRST

BY

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OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

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THE AMERICAN LAW REVIEW.

JULY-AUGUST, 1911.

THE JUDICIARY AND THE ADMINISTRATION OF THE LAW.

The judicial branch of the government, in common with all the other branches, is established and maintained by the people and is eventually answerable to the people for the due performance of its duties. Therefore, it is not to be deemed above criticism or reform, notwithstanding the peculiar honor with which its high duties invest it; and whether it shall be critically examined, and how, are questions of expediency rather than of sacrilege. There are some who think that even well considered criticism of the judiciary should be wholly avoided as likely to create distrust and impair its efficiency; but in a government by the people no part should be exempt from examination and just comment, in the effort to check abuses, if they exist; and, in the case of the judiciary particularly, there are sound reasons for an earnest and careful examination into its fulfillment of its high duties.

We must remember that the judiciary possesses and exercises the power to punish for contempt, and that this power is used without serious question from the people, although the exercise of a similar power by the executive branch would be viewed as revolutionary and by the legislative branch as at least ill advised. In this respect, whether by

arrogation or by common consent, or by legislative authority, the judiciary exercises a control over the individual citizen which the legislature rarely, if ever, attempts to exercise and which the executive would not dare to exercise.

Furthermore, the judicial branch of the government is singularly free from personal responsibility in the performance of its duties. A judge of a lower court may be reversed by a higher court; but however mistaken, or even corrupt, he may be, he cannot, except in a very limited class of cases, be held to liability to the litigants before him, or even, except in rare instances, to the people. A judge of the court of last resort is not only free from personal liability, but he is not even subject to the correction of a superior tribunal. Theoretically all judges may be impeached for maladministration of their office; but actually the risk of punishment is so slight as to be negligible—and it is in fact neglected. Even more than that, the judiciary is also peculiarly relieved from personal criticism. The lay public does not understand the operations of the courts, and does not know, except in the most general way, whether or not they are properly discharging their functions. The lawyers, on the other hand, who are possessed of adequate knowledge on this subject, are naturally reluctant to assume any position that suggests hostility to those to whom they are submitting the interests of their clients. Then, too, the judicial office in itself lends dignity and force to the utterance of its incumbents, and this tends to obscure their shortcomings. The consequence is that the courts, especially those of last resort, wield a power which, within its scope, is as uncontrolled from without as though it were despotic.

Finally the courts, particularly the English-speaking jurisdictions, administer a law which they themselves in the main define, and because in large measure the law determines our form of civilization, the courts wield an influence in the development of the world which few lawyers and still fewer laymen comprehend. The advance of mankind toward the goal of peace and happiness is largely in the

hands of the courts; and when they fail in the administration of justice they delay the march of civilization itself.¹

It is not strange that with these privileges history has in its perspective sometimes brought to light faults in the judiciary which were not always contemporaneously recognized or frankly acknowledged, and that individual judges have become types illustrative of non-judicial qualities marring and preventing the due administration of justice. We call to mind the historic example of the judge who protested that he could accept gifts from suitors without being thereby swerved from the due administration of the law and without being bribed, and who, though he possessed powers as a philosopher and writer that will make him ever famous, still stands as a type of the corrupt judge; or another who, carried away by personal spite and hatred of the adversaries of his king and religion—though even he is said to have been unjustly accused—has become the type of the malignant avenger, using judicial office to execute his personal and malevolent will. There were several judges in New York City during Tweed's unspeakable régime whose misdeeds do not need to be rehearsed, but who have become the type of a corrupt judge in a democracy, dominated by a man or a financial interest for the direct and open purpose of preventing the due and impartial administration of justice,—perhaps the meanest and most despicable of all possible types.

The reflections invited by these considerations and others that readily come to mind, suggest that in order to preserve

¹ The general inclination to limit the constitutional guarantees of freedom of speech, so as to exclude the free criticism of judicial officers for judicial acts is illustrated by some recent cases as well as by the resentment which has followed some recent and well circulated public utterances on this subject. These naturally provoke the questions whether by extension of their principle the judiciary is to become sacrosanct and beyond criticism, and whether the protection of our

guaranteed freedom of speech demands the erection of warning signals. See *Matter of Mannheim*, 113 App. Div. 136, lawyer rebuked for writing a letter of criticism to a judge; *Matter of Rockmore*, 127 App. Div. 500, lawyer suspended for making charges against a judge in proceedings to review his decision; *In re Thatcher*, 89 N. E. Rep. 39 (Ohio), lawyer disbarred for criticizing a judge nominated for re-election. See also 9 Col. Law Rev. 722 (Dec., 1909).

our liberties and to maintain the highest interests of mankind, the judiciary should not be free from just criticism of its acts, even though that criticism be contemporaneous. For these reasons it seems proper, and it is in fact an appropriate time, to inquire how far this branch of the government, both national and state, fulfills its purpose of the due administration of justice according to law; whether there is room for improvement; whether local or other conditions impose limitations which hinder or prevent the due administration of justice; whether specific suggestions for improvement may be made, and, generally, whether any profitable observations may be made on the judicial system or the judiciary.

In approaching these grave problems, it is essential to understand something at least of that historic past from which the active present has grown by evolution, and, because in almost all English-speaking jurisdictions the jurisprudence of the country is traceable to the common law of England, it is incumbent upon us to consider, at least briefly, the precedent English conditions.

In England the judges were appointed by the Crown for a life tenure, and the compensation that was paid to them for their services, together with the state and dignity that surrounded their office, were such as to make the appointment the highest culmination of the professional career. The method of selecting judges may be illustrated by reference to the law courts, although there may have been other courts in which equally efficient methods were adopted. In the law courts appointments were made from only a special order of practitioners of law known as barristers, who alone were authorized to appear before the court in judicial proceedings and who by long established convention did not usually come into immediate contact with their clients, but were engaged for the clients by their solicitors. When arguments or trials became necessary, the choice of a barrister to represent the client was commonly made on the recommendation of the solicitor. The result of this division of

function was that if the barrister attained distinction in his profession, it was through the impress which he made upon his fellow practitioners, the attorneys or solicitors. His position at the bar, therefore, was determined by expert opinion. The consequence was that, although politics entered into judicial appointments in England, as elsewhere, nevertheless the appointments were necessarily made from among the leaders of the bar—that is to say, from among men who had established their position in the judgment of experts.

These conditions existed in England for many years and *particularly during the formative period of the common law*, and notwithstanding some notable exceptions, they had the practical effect of insuring almost always a high standard of appointments to judicial office and high principles of judicial morality. It was under this system of appointment that the doctrines of the common law were developed and so firmly established that they dominate the law of today, not only in England, but in almost all English-speaking communities.

Conditions like these, however, have not generally prevailed in this country. Except possibly for an inconsiderable period of time, the distinction between barrister and solicitor has not been observed. When, therefore, an attorney at law has achieved a high position and become known as a leader of his bar, his success has been due not merely, or perhaps not even largely, to the impress which he has made upon his fellow practitioners, but rather to the impress which he has made upon the minds of the lay public. This is particularly true at the present time when the affairs of large monetary interests are so much a matter of public concern that their attorneys are frequently in the public eye. The lay public, however, is not competent to judge with entire accuracy of the qualifications of such specialists as attorneys at law. Their judgments are made in the rough and necessarily include elements which lead, or tend to lead, to serious error. Thus it happens that the men of

highest legal ability in a given community are not always those who have made the greatest popular reputation, nor are the leaders of the bar always the ablest members of their profession; that is, they are not either the most learned in the law, or the most intellectually capable of dealing with complicated legal questions, or even best able to give practical counsel in practical affairs. There are many men engaged in the practice of the law, especially in the large commercial centres, whose competency for their profession is founded upon a more solid basis than that of their better known contemporaries.

Again the judicial office has never been so attractive as a reward of professional success in this country as it has been in England. While always dignified and respected, it has never been surrounded with the state or accompanied with the emoluments which are there established. The consequence has been that it has offered little inducement except a purely sentimental one to the successful practitioner at the bar. In almost all our communities at the present time the acceptance of the judicial position involves a financial sacrifice, if the appointee has already established even a fairly remunerative practice.

In the early days of the colonies and of the states of the Union after the revolution the justices were appointed; but this method of selection often carried with it unquestionable evils in the administration of the law, and consequently the people tried the experiment of an elective judiciary. It is not intended here to enter upon a discussion of the relative merits of the two systems, but it may be pointed out that the experiment of popular election certainly did not succeed in conspicuously bettering prior conditions, and the professional and popular dissatisfaction with the judiciary seems on the whole to be greater where the judges are elected than where they are appointed.

This brief sketch makes apparent one notable fact—that the particular causes tending to elevate the fittest members of the bar to the bench which existed in England have al-

most, if not quite, disappeared in this country, and that there are no corresponding conditions now existing among us. On the contrary, the tendency has frequently been to choose the more mediocre members of the profession, and thus to produce in many cases the anomalous situation of a judiciary which does not command the intellectual respect of the bar which practices before it.

We have touched upon the influences which bear upon the personal selection of the judiciary. There is, however, still another influence at work in the administration of the law more potent than any which depends upon personal character.

The English common law as a system of jurisprudence began to take form in the middle ages when scholastic methods of thought dominated the entire intellectual world. These established a standard of technical logic which, when carried to extreme, as it often was, degenerated into fantastic quibbles. In the domain of the law this spirit resulted in technicalities of procedure and of substantive rights which in time became insupportable in their hardship and injustice, and attempts at remedy were frequent. One of the earliest and most famous of these attempts is the statute which resulted in that large class of actions at law known as "actions on the case." Judicial proceedings were instituted by original writs, which were writs issued by the clerks in chancery to the sheriff, directing the sheriff to produce the defendant in court on a day certain to answer the complaint of the plaintiff. These writs briefly described the nature of the action. Such was the conservatism of the clerks, however, that they declined to issue writs in any case for which they could not find a precedent among their own records. Accordingly an act was passed which directed the clerks to issue new writs upon request, even in new cases, the statute providing, however, that the new writs should be issued in cases which were similar (*in consimili casu*) to those which were already embodied in the precedents.

These new actions were known as actions on the case, and they considerably and beneficially extended the scope of legal remedies. Again, however, the conservatism of the profession was such that, even with this aid, the administration of the law was not broadened beyond certain narrow confines. These seemingly irremediable limitations in the procedure and remedies of the law courts led to the ultimately great enlargement of the extra legal system known as the court of chancery. Even the court of chancery, however, which was modeled on the ecclesiastical courts, was largely dominated by the same spirit of scholasticism. Its doctrines were excellent, but its procedure was complicated, technical, long-drawn out, and expensive.

The scholastic spirit, however, eventually passed, and with its going a new but long delayed independence of thought developed which penetrated even to the conservative ranks of the legal profession. The struggle between the new and the old continued for many years, and, with the intervention of Mansfield and Jeremy Bentham, and a host of lesser lights, ended in a great defeat of the ancient scholastic ideals and rigor. In this country particularly there has been a violent departure from the past. The revolt, however, went too far. The remedies adopted were often hasty and ill-considered, and were sometimes worse than the disease. The adoption of codes of procedure, which were intended to do away with the hardships of the older law, have introduced in their stead complexities and technicalities quite as great as those that previously existed. It is not too much to say that they have proved to be an evil in themselves, rather than a cure for evils. At the same time with the revolt against technicality came a loss of that sense of strict respect for precedent which was also a part of the scholastic system. "Substantial justice" became the shibboleth, and in the protest against scholasticism, technicality, and rigor, the desire for careful and rigorous thinking fell largely into abeyance. Legal principles became confused,

blurred, and sometimes so completely lost to view that it has become necessary to rediscover them. This work is now being done by the better class of law schools, but these are of comparatively recent growth. Their pupils are only just beginning to attain the years that are essential to full influence at the bar and to availability for judicial office. Meanwhile, however, during the transition from the technicalities of the common law to the broader and new science, there has intervened a period which has been largely characterized by formless legal thinking. The result has been embodied both in the statutes and in the decisions of the courts, and has therefore done an incalculable harm, which will require many years of effort to counteract.

There is still a third influence which has been potent to embarrass the administration of the law, particularly in this country, and that is the unprecedented increase in litigation. In a busy court at the present time the individual justices will sometimes render more decisions in a year than their most illustrious predecessors rendered in a lifetime. Haste has invaded the halls of justice, and because of the usual complexity of legal questions has had its inevitable effect.

These three influences—the absence of a fixed standard in the selection of the judiciary; the overturning of ancient legal concepts with only a tardy substitution of newer and clearer modes of thinking; and the sudden increase in the mass of litigation—co-operating with the natural frailties of human nature, carelessness, prejudice, and even corruption, have been the main deteriorating influences at work in embarrassing the due administration of justice and are the main causes for criticism of the judiciary, when such causes exist. Let us now determine, if we can, the actual effect of their operation.

In projecting our work on this subject we sent out about 350 circulars asking for replies to certain questions from four selected classes of men outside of the State of New York, and to a single class within the State. These classes were:

1. The men who were regarded, from the best information obtainable, as the leaders of the bar in their respective communities.
2. Members of the American Political Science Association prominent in their respective communities, and generally not members of the bar, but professors in colleges engaged in the study and teaching of political science and kindred subjects.
3. Members of the Harvard Law School Association who graduated in the decade from 1895 to 1904, who have located in other communities and who might be considered to represent a younger and not so well-established an element in active practice as the members of class 1; and
4. Commissioners on Uniform State Laws appointed by the governors of states.
5. In New York, the single class addressed consisted of men who have taken an active part in the New York State Bar Association.

The questions contained in our circular were as follows :

1. Is the bar in your local community, or in your state, content with the present administration of the law?
2. If any dissatisfaction exists, is it directed against the procedure of the courts or against the intellectual or other incapacity of any class or of any individuals among the judiciary, and does it exist generally or is it confined to any particular members or class of members of the bar?
3. How would you answer the preceding questions with reference to the opinions, not of the bar, but of the lay public?
4. If you have any personal views with respect to the matters embodied in the foregoing questions, will you state them in so far as they may contain suggestions for action by the bar?

We received no replies from Arizona, California, Idaho, Kansas, Maryland, Minnesota, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah and Vermont, fifteen states and one territory. In

one of these instances our letter went to the chief justice of the highest court, who humorously replied that he "pleaded his privilege, that his answer might tend to incriminate him."

We received, however, replies from the following states and territories:

Alabama, 1; Arkansas, 1; Colorado, 1; Connecticut, 3; Delaware, 1; Florida, 1; Georgia, 1; Illinois, 3; Indiana, 2; Iowa, 1; Kentucky, 2; Louisiana, 1; Maine, 1; Massachusetts, 1; Michigan, 2; Missouri, 3; Montana, 1; Nebraska, 1; New Hampshire, 1; New Jersey, 1; New Mexico, 4; New York, 6; North Dakota, 2; Pennsylvania, 2; South Carolina, 2; Tennessee, 3; Texas, 1; Virginia, 1; Washington, 2; West Virginia, 1; Wisconsin, 1; Wyoming, 1. Thirty-one states and one territory; fifty-five replies.

These replies are not numerous, but, inasmuch as the circulars sent out did not average more than seven to any one state, our inquiries produced results in about sixty-six per cent. of the states to which they were sent and elicited answers from about sixteen per cent. of those to whom they were sent. This is a larger percentage than perhaps could have been expected. Few lawyers thus addressed could be expected to entrust criticism to those with whom they had no personal acquaintance. It is, however, a noteworthy fact that almost all the replies which we received came from lawyers in active practice and a goodly proportion from among those whom we were led to regard as the leaders of the bar in their respective communities. Many of our correspondents are of national reputation and all of them are to be regarded as representing the conservative element of the profession. Their judgments bear the mark of careful and conservative statement and not one of them seems to be the expression of a radical, or even of an aggressive, spirit of reform.

In view of the character of the replies which we received, it is most instructive to note that, out of 55 replies, 32, or

considerably more than half, indicate positive dissatisfaction among the members of the bar with the administration of justice in their respective localities. These are divided as follows:

Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Virginia and Washington. Nineteen states and one territory out of the 31 states and 1 territory from which we received replies.

The satisfaction of the bar with the general administration of the law was, on the other hand, expressly asserted in communications from Arkansas, Connecticut (opinion divided), Florida, Georgia (opinion divided), Maine, Michigan (in one communication; another was emphatically to the contrary), New Hampshire, New York (in which the sentiment is stated to be divided), in South Carolina (opinion divided), and West Virginia, and with the trial courts in Washington. The encomiums of our Arkansas correspondent upon the law of his state seem worthy of exact quotation. He says: "We have a practice remarkably free from technicalities and one which seeks only the justice of the case, and our system of jurisprudence is reasonably just and progressive." So, too, in New Hampshire, it was stated that the "system is convenient, simple and effectual."

The opinions were so emphatic in so many instances, that there is general dissatisfaction with the way in which the courts actually administer the law and it seems so apparent that, in an age of economic improvement in mechanical and industrial machinery, the procedure of the courts is in many instances an economic absurdity as compared with what might be, that the suggestion of a Missouri correspondent for a *Lawyers' Congress* to consider reforms in the administration of law seems pertinent and forcible. It is assuredly not merely speed that is wanted, but (as one correspondent from Nebraska strikingly expresses it), lawyers should ap-

preciate that clients will patronize courts *when they do justice*; he suggests greater opportunity for a preparation of the facts and the substantive law instead of making a *science of procedure*, as at present; he says that present procedure has dethroned respect for the courts. A Tennessee correspondent suggests the amendment of procedure to avoid delays, to diminish continuances and to administer justice without haste and without delay. A Pennsylvania correspondent suggests a reform through the relaxation of technical rules of evidence, the adoption of a principle that no cause shall fail through mere technicalities, that there shall be no reversal except for substantial error; and that justice, surer, swifter and cheaper, shall be the aim of our judicial system. An Iowa correspondent suggests that public opinion should emphasize a speedy and effective law enforcement and then a way would soon be found to accomplish it. An Illinois correspondent attributed much of the dissatisfaction to the absence of ethical standards at the bar, and the substitution of the individual conscience. Many suggestions for a reform of administration came from New York, such as a differentiation of the work of the courts (as is done already in New York County) by the institution of negligence calendars, commercial calendars and other calendars, presided over by different judges; a corrected procedure, having adequate machinery for reaching results at the earliest practicable moment, the abolition of unnecessary technicalities and refinements, the total abolition of legislative interference with procedure and the entire separation of the judicial from the legislative power, with the absolute power in the judiciary to regulate procedure. A Nebraska correspondent said that at the recent annual meeting of the State Bar Association every committee report and every address but one expressed dissatisfaction with the present administration of the law. In Indiana the suggestion is made that the courts should pay more attention to the rights of litigants (as though the courts existed for anything else!), and our correspondent pointed to, for practical illustration, a client who was finan-

cially ruined by his successful efforts to secure the rights which were finally awarded to him. From Louisiana came the suggestion that the hope of the courts lies in the elevation of the standards of admission to the bar to cover education and character.

Before touching upon the shortcomings of the judiciary itself, as set forth in our correspondence, we will indicate two other elements in the present administration of the law which are suggested as causes for dissatisfaction, but for which the judiciary is hardly responsible, though it might do much to mitigate their evils. These are the evils of procedure and the incapacity of members of the bar.

The shortcomings of the system as causing the dissatisfaction of the bar were attributed either wholly or in part to the procedure in Connecticut, Delaware, Illinois, Kentucky, Missouri, New Mexico, New York and Wisconsin. Of this procedure it was said by a Connecticut correspondent that it is beginning to be complicated under the code, and he suggested that it would be well to destroy the code and begin again. He added that close adherence to the forms of pleading is to be deplored. Of Delaware it was said in substance that not one of the reforms elsewhere since the Hilary Rules of 1843 in England, or indeed those rules themselves, have been adopted, that the court is powerless to permit amendments, that its pleading and practice is most inadequate and that the law permits and requires a non-suit on technicalities. On the other hand, and in curious contrast, it was said of Arkansas that while its system of jurisprudence merits the encomiums which we have already cited, the very lax rules respecting admission to the bar and the simplicity of the practice had permitted the admission of many unworthy members and that the bar had degenerated on account of the freedom of practice, while in Iowa it was said that the easy civil procedure makes slovenly lawyers.

From our correspondents the faulty and unsatisfactory administration of the criminal law was the subject of special

remark in Kentucky and Texas, and in Pennsylvania it was said the criminal law is too uncertain.

The *jury system* received a considerable share of condemnation. A very prominent Louisiana lawyer earnestly urged the abolition of trial by jury, except in criminal cases, stating that after a long life of active practice, he could only characterize it as a delusion, a snare and a fraud, and that he was satisfied that it results in a miscarriage of justice in ninety-nine per cent. of the cases in which it is used. Adverse comments on it were also made by writers in North Dakota, Connecticut, Kentucky, Pennsylvania, Nebraska and New York. In New York emphasis was laid on the lack of proper accommodations for juries, on the inexcusable waste of jurymen's time, and the universal disinclination to jury duty, resulting in a jury service of less than average ability and intelligence. In Kentucky the practice of juries in criminal cases was condemned, and attention was called to the immunity ordinarily meted out to election officers, gamblers and murderers. In Texas it was said that the criminal law is lax and punishment rare. In Nebraska it was said that the jurors are too often intellectually incompetent and that the ambulance chasers only are satisfied. In North Dakota it was said that the jurors are too often ignorant of the English language to understand the proceedings. From Pennsylvania it was said that the jury system is out of place and no unanimous verdicts should be required. From North Dakota came the suggestion for a bench of three judges to determine facts and law in all civil actions, and from Connecticut a recommendation of the election of jurors, with a salary, to sit with the judge, in minor cases two, in major cases four, with a larger jury still in criminal cases involving the possibility of heavy penalties, but without the requirement of a unanimous verdict in such cases; all of such jurors to be intelligent and unprejudiced.

Delay in the courts invited frequent adverse criticism. In some instances this was attributed to the lawyers, notably in Indiana, Connecticut, New Mexico, Wyoming and New

Hampshire (the latter in one county only). In Connecticut one of our correspondents, in order to show that delay was not the fault of the courts, pointed to the fact that he had recently had two trials of one case, and two appeals to the highest court of the state, one ordering a new trial, and another finally disposing of the cause, all between October and May. But delay in the courts was assigned as a cause of dissatisfaction in Indiana, Kentucky, Massachusetts, Missouri, Nebraska, New Mexico, New York, Pennsylvania and South Carolina. In Indiana the delay on appeal was particularly mentioned, and attributed to inadequate machinery; while in Kentucky the court of appeals was commended for its zealous activity. In Michigan the delay in the United States Court was emphasized. Our correspondents commented generally on faults of the system not attributable to the judiciary, though, perhaps, the judiciary might by taking thought minimize some of these faults.

The incapacity of the bar, not of course the whole bar, but of a sufficient part of it to cause comment, was mentioned by correspondents in Arkansas, Illinois, Louisiana, Michigan, Missouri, Montana and New York. On the other hand, a Massachusetts correspondent emphatically refers to the bar of his state as a body of high integrity and ability, though even he admitted a few tricky members, and an occasional dishonorable one. In Arkansas, as already stated, our correspondent specifically refers to the simple practice which he praises, as responsible nevertheless for a marked degeneration in the capacity of the bar; and our Iowa correspondent remarked that the civil procedure was so easy that it makes slovenly lawyers. In Maine it was said that the bar might at least maintain the morale of the profession if it did not remedy the procedure. A Michigan correspondent expressed the view that half of the bar of that state is not reasonably qualified, and he contrasted it unfavorably with the qualifications exacted from and possessed by the medical profession, emphasizing what he deemed a technical and antiquated procedure, which perhaps the bar could change if it would.

In New Jersey, although there was no reflection on the bar, the statement was made that the recent proposed amendments to the New Jersey constitution which would have changed the antiquated system of courts into a system far in advance of any existing so far as we know in any American state, were rejected chiefly on account of the popular distrust of anything proposed by lawyers. In Wyoming it was said that the bar as well as the bench fails to appreciate that the object of codes and procedure is the prompt, certain and systematic disposition on the merits of controversies brought before the courts. In New Mexico the bar was criticized for the useless examination of witnesses, for prolonging arguments on immaterial points of law, its bad pleading and unnecessary or technically improper motions. In Illinois it was said that in criminal trials the lawyers exercised too great freedom; that the difficulty is largely with the lawyers and that a better class of lawyers is imperative. In Pennsylvania the bar associations were criticized for their supineness in permitting political parties to make unfit nominations for judicial position without criticism or remonstrance, and for their inactivity against unfit attorneys. In New Hampshire attorneys were criticized for such delay as there is, and our correspondent remarked that he knew no remedy against clients for overloading the best lawyers with work. One of our New York correspondents suggested that some rule or practice should be adopted to avoid waste incident to inexperienced advocates, so as to require some certificate of fitness before their admission to conduct a trial or argument. Another suggested that the County of New York in particular is suffering from incompetent advocates, due to the joining in one man of two separate powers, attorney and counsel, and that there will never be a competent body of advocates until a system is devised which shall, however, be American and not English, because a class distinction will not do in this country. He did not suggest the outlines of such a system.

Leaving our system of jurisprudence with its inherent defects, its antiquated and inefficient procedure, its uneducated or slovenly or unethical bar, its unintelligent and incompetent jury, its inexcusable delays, and coming to a consideration of the judiciary as our correspondents see it, it is to be noted that we chose no malcontents, or rabid reformers or fanatics or recognized agitators, but confined ourselves to prominent and leading lawyers, to their supposedly intelligent and hard working juniors, to studious political scientists, and to commissioners on uniform state laws, and this is what we find by them charged against present members of the judiciary:

Intellectual and other incapacity; bad personal habits; improper political activity; proneness to play politics; absence of a sense of obligation to their office, to the legal profession, to the public; that the judges confine themselves too closely by legal technicalities; that they hold cases too long; that they are lazy; that they are dominated by local influence; that they are lacking in legal ability, or are of less than average ability; that they are unduly active for reelection; that they permit delay; that they are temperamentally unfit; that they are influenced by the judges in review of whose decisions they sit; that they misuse their patronage; that they are of mediocre or inferior quality; that they are guilty of conduct worthy of criticism; that they are grossly unfit (one complaint of unfitness because of habitual drunkenness was made); that their individual judicial conduct has been the subject of scandal; that they are subject to corrupt influence; that they wilfully disregard the rights of individuals; that they are guilty of excessive zeal; that they are of undue temper; that they have too great regard for their personal friends; that they are susceptible to outside influences; that they misconceive their function; that they are partial to certain classes of litigants, notably large corporate and financial interests; that they are under the control of legislators or politicians, or are influenced by political considerations; that they do not command respect or

confidence; that they are inferior or second-rate men, or of a low order of ability; that they are not the best lawyers, nor lawyers of the highest standing; that the best members of the profession will not take judicial position; that they are physically feeble; that they are intellectually weak; that they are ignorant of the procedure of their courts; that they depart from it; that they decide individual cases and not the law; that they are not well seasoned; that they have not the judicial temperament; that they lack robust courage and independence; that the elective judiciary is not satisfactory; that they abuse the poor; that they pay too great heed to the technicalities of procedure; that they are weak in grasping and holding to legal principle and for that reason their decisions are often conflicting with each other and most unsatisfactory in that they give poor reasons for a correct decision; that it is a common remark that you cannot tell what the next decision of the court on the same point is going to be, and the case law is in a chaotic state; that they decide cases justly enough, but their opinions are written with such a feeble grasp of legal principle that one cannot extract any rule of law from them (and this of a supreme court); that the opinions show a lamentable feebleness both in English style and in logical and lawyer-like reason; that local and minor judges are subject to insidious political influences; that the character and calibre of minor judges is deplorable, and that the minor justices are unfit.

Now it must not be understood that these complaints all come from one locality, or that many of them were made of the judiciary of any one state, or that in general they were considered to apply to all of the judiciary of a locality, or that all of them are of equal weight and importance, but the sifting and collection of all the specific complaints resulted in this rather horrible display of shortcomings among members of the judiciary. Generally speaking the judiciary is elective, and these are the kind of men whom, it seems, the people have elected as judges. It cannot be said that these faults characterize the entire judicial system of any single

commonwealth, they merely exist within it, and are a part of the machinery of justice with which is lodged the power to punish for contempt and to which is due the traditional respect for the ministers of the law, which we give to or withhold as we please from the executive or legislators, but must perforce yield to the judiciary and their decrees.

It lightens the darkness of this dismal picture to know that from Massachusetts comes the assurance that the judiciary are of absolute and unquestioned integrity, and of the highest intelligence and judicial ability; that from Indiana, though every voter, however ignorant, has the constitutional right to practice law, comes the statement that no canons of judicial ethics are necessary, and that Indiana has no better citizens than her judges—that they are honorable and intelligent and have the confidence of the bar; that in New Hampshire there is no criticism of the bench; that in Connecticut the judiciary has the confidence of the bar; that in Texas, while there is no Mansfield or Marshall, there are no inferior judges, that their character is never impugned, that they are honest and upright; that in Pennsylvania, except the minor judges, they are generally upright and honorable; that in Kentucky, *as a rule*, their judges are considered honest; from Iowa, that they are *for the most part* honest; from Missouri that it is the system rather than the judiciary which is at fault, and that the criticism of the judiciary is frequently unfair; and from Tennessee that the judiciary are not incapable.

In several of the states where the judiciary has been so criticized, it is attributed to the method of nomination and election for political or partisan reasons, in others to the meagre salaries of the judiciary.

It now remains to set forth the attitude of the lay public as reflected in our correspondence. Of this it was quite generally said that the public was not sufficiently advised to give intelligent criticism, and an Iowa correspondent suggested that if the public would emphasize speedy and effective law enforcement, the judges would soon find a way

to accomplish it. In Delaware, Indiana, New Mexico and Virginia, it was said that the public is satisfied; in Georgia, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana and Pennsylvania, that it is dissatisfied; in Colorado, that it generally finds fault, but owing to ignorance of the advantages and necessity of rules of procedure and the delay incident to their execution, this is not entitled to weighty consideration. This dissatisfaction manifests itself, it is said in Colorado, in criticism of delay; in Kentucky, in lack of confidence; in Montana, in criticism of the politics of the bench; in Maine and New Jersey, in criticism of the delay; in Maine, also, of confusion in the statutes; in Missouri, that it is not confined to a criticism of procedure, but extends to criticism, frequently unfair, of the character of the individuals composing the judiciary; in New York various answers considered the public as indifferent or as generally having confidence, while others considered it as dissatisfied with the law and its administration as annoying, as too complicated, as incomprehensible and too technical, as bewildering, as uncertain, as a mystery, and as too expensive, while others condemn especially the administration of the law of negligence, and the delay and waste of time incident to frequent attendance in court without being reached. In Virginia it was said that the public criticizes the method of using the patronage in the United States courts which might be mitigated, it was suggested, by some consultation with attorneys of the bar of the court. In Wyoming the dissatisfaction is said to be due to delay resulting in the miscarriage of justice; in Texas to the "damage suit industry," and the fixing of liability on corporations by juries regardless of their negligence, an evil which might be remedied, it was suggested, by statutory compensation for unintentional personal injuries and by changing the character of the judge's charge to the jury so as to permit him to indicate his opinion of the evidence. In South Carolina, it was said that the layman criticizes the lawyer and that professional ethics are abused; in Illinois that the people usually

take a purely selfish view; in Kentucky that they regard the criminal law as hopelessly inadequate; in Indiana that they criticize the delay, and that they express an unintelligent dissatisfaction; that they fail to understand professional ethics, and too often identify the lawyer with the client; in Alabama that only a small proportion know of the operation of the courts; in Pennsylvania that the popular dissatisfaction is increasing and is suspicious of the protection of special interests; in Illinois that laymen believe that the courts protect the law-breakers; in North Dakota that laymen complain chiefly of the delay in the supreme court; in New Hampshire that they unintelligently scoff at the delay and expense of litigation; in Tennessee that they lament the politics in the courts; in Nebraska that they regard the points made by lawyers as absurd and as resulting in the technical deprivation of rights, and that they deplore the frequent release of criminals on technicalities; in Missouri that they feel a greater dissatisfaction than the lawyers; and in Washington that the lay public, taking them as a mass, are not sufficiently instructed to appreciate the defects which the lawyers find, but that sufficient criticism has filtered down from the bar among the public to induce a feeling of lack of respect rather than of anything stronger for the supreme court. In Wisconsin it is said that the lay public is more dissatisfied than lawyers with the results and methods of judicial procedure.

It is to be borne in mind that these reports are merely the interpretation of lay sentiment by legal practitioners. But one surprise lurks in all this comment, and that is that no one of the critics so much as mentions any complaint of the abuse of the power of injunction. Apart from this, however, it is to be noted that the popular criticism, however unintelligent or ill-advised it may seem to be, sees nothing to condemn which the lawyers themselves in their respective communities have not in the main already discerned.

There are many suggestions among our letters for methods of improvement.

From Colorado come suggestions for the removal of the judiciary from politics; the increase of judicial salaries to warrant acceptance of the office by the more competent and abler members of the bar, longer terms of office to remove judges from the influence of the rabble, but that no radical or revolutionary methods should obtain; from Indiana, that the judges should be required by law to clean their dockets and make a periodical report of their condition to the governor; from Louisiana, that the salary and length of term should be increased, and that there should be a thorough reform of legal procedure, including the abolition of trial by jury except in criminal cases; from Missouri, that unless lawyers seriously and promptly undertake the reform of legal procedure, the lay public will do it; from Montana, that steps having been taken to secure better qualifications on the part of the bar, there should then be secured to judges a life tenure of office and a high salary; from New York, with practical unanimity, that there should be a radical change of procedure in the direction of simplicity and the abolition of technicalities, the English procedure being referred to as furnishing an admirable and ready-made model for improvement; one correspondent hopelessly expresses the view that because of the elective system the mediocrity of the bench is permanent; from South Carolina, that there should be a thorough change of procedure to reduce technicalities and effect simplification and despatch; from New Mexico, that a radical change in the constitution and appointment of its judiciary is absolutely essential; from Illinois that there should be a careful study of British methods of procedure and that there is an imperative need of a better class of lawyers; from Connecticut that every law-suit should be made a complete settlement of all dispute between the litigants, so that a judgment should be an effectual general release in respect thereto, except of the rights expressly established by the judgment; from Missouri that there should be a lawyers' congress to consider reforms in the administration of the law; from Alabama, that judges should be

elected by members of the bar; from Pennsylvania, that the bar associations should actively interfere to compel the political parties to make good nominations; from Tennessee, that the salaries should be increased, that the judiciary should be appointive for longer terms and with eligibility for re-election, though another correspondent from Tennessee recommended ineligibility for re-election; from New York that the judges should be appointed by the governor to a life term and that the judges should be selected from the active bar; from Washington that the judicial elections should be separated from the political elections; that the terms should be extended, and the salaries increased, particularly in the cities where expenses are greater, but rural jealousy is recognized as a bar to this discrimination; from Wisconsin that the decision of a jury should not be required to be unanimous, that the time for the determination of cases should be shortened, and the right of appeal curtailed.

Such, in brief, are the suggestions for reform which emanate from our brothers in the profession. Before deducing our own conclusions, however, it is appropriate to advert to a discussion by Simon Fleischmann, Esq., of the Buffalo bar, in a paper read by him at the annual meeting of the New York State Bar Association in 1905. He adopted a method similar to that selected by us for ascertaining the sentiment of the bar in other communities, and it developed an overwhelming disapproval of the present method of electing judges. He stated that the answers which he received showed great unanimity of opinion and that the conclusions were that political activity and influence rather than legal ability determined the selection of judges in nearly all of the states and territories; that as a rule they are impartial, but only fairly competent; that they have not a full measure of the confidence of the bar and public; that the men best fitted to be judges are not usually upon the bench; that the most favorable reports as to character, ability and freedom from political considerations in their selection come from appointive states, which are also the eastern and older com-

munities. It was also generally reported to him that members of the bar, whether collectively or through bar associations, exerted little influence in the selection of the judges, though lawyers individually and as active politicians had in some localities much influence. Mr. Fleischmann's final conclusion was that the character and ability of the bench are governed practically by the tone and demands of the average public sentiment in a given locality, rather than by the particular system through which the sentiment asserts itself.

We have briefly summarized the general results of the present system of administering the law as seen by our correspondents. Their letters point to a dangerous unrest and distrust pervading the country, which should be allayed if we are to make a substantial advance in the line of progress, or, perhaps, even avoid a serious upheaval in the body politic. They indicate, therefore, a problem of the gravest character, the solution of which is of the highest import to every citizen. In spite, however, of the gravity of the problem, these letters exhibit a curious helplessness on the part of the legal profession in meeting it. In the first place, while there is expressed a very considerable degree of dissatisfaction with the administration of the law, the complaints partake more of the nature of grumbling than of a conscious and earnest protest against conditions which are fraught with serious perils. They indicate little, if any, effort to achieve better things. In the second place, they indicate a weakness of which the bar must take full account in its efforts at reform, and that is the singular lack of influence which it exercises in the community at large. Thus a valuable series of reforms in New Jersey was defeated, according to one correspondent, largely because it emanated from the bar and was therefore distrusted by the people. So, too, the failure of the "Judiciary Nominators" in the City of New York (who several years ago put forth and actively supported a judiciary ticket of remarkable strength) to secure more than an insignificant number of votes for

their candidates is of recent memory. In the third place, and more important than the others, is the indication of helplessness afforded by the suggestions for reforms which emanate from our correspondents. With all due respect, none of them is fundamental or adequate to meet the need. For a single example of deficiency, we may point to the fact that no correspondent suggested a code of judicial ethics, and yet it seems to be beyond reasonable doubt that if a code is required for the bar, whose duties are, of course, important, a similar code is even more essential in the case of the judiciary, whose duties to the community are still more important.

No concern of man on earth is so vital as the due administration of justice. We of the legal profession, retained in behalf of our clients to see that they receive justice, owe it to them to understand the gravity of this need. We must see that the problems which it creates are not to be treated lightly or in the belief that palliative, temporizing, or superficial measures will suffice. We must see that they call for revisory and constructive work of the highest character, demanding the best that we have in us to give. We must recognize that it devolves upon us to address ourselves without delay to the solution of these problems, and we ought to resolve to join hands at once in a common effort to attain this common good.

While the thorough-going and fundamental reforms which the present conditions so insistently demand can only come after conference and careful discussion and effort, extending perhaps over years of time, nevertheless suggestions for remedies, temporary and otherwise, may be advanced and general lines of progress may be briefly indicated.

A most important preliminary step in the way of reform is a full and cogent statement of the moral principles which should guide the judiciary. It is curious to note that in all the complaints which we received there was no suggestion of any canons of judicial ethics. In our view, however, some such canons ought to be formulated

and promulgated by the authoritative associations of the bar, and that as speedily as may be. They should clearly and concisely make it known that the judge should so administer the law in the settlement of controversies as to show that he appreciates his position as honorable of itself and honorably to be maintained; that his conduct should uniformly be that of a gentleman and an officer and for the good of the service; that he should be ever conscious of his responsibilities, attentive to his duties, assiduous in their performance, and avoid delay as far as possible; that he should be scrupulous to free himself from all improper influences and from all appearance of being improperly or corruptly influenced; that he should be studiously regardful of the rights of litigants; that he should be an independent and representative citizen, rather than a partisan; that he should use the necessary patronage of his office as a public trust, and that in the selection of referees, receivers, or other judicial appointees he should conscientiously appoint only men known to him to be of integrity and fitness for the duty assigned; and if he is permitted to practice at the bar, or to prosecute private business, he should not permit such matters to interfere with the prompt and proper performance of his judicial duties.

Our next step should be to inaugurate such reforms in the selection of the judiciary as shall lead to the selection of men of highest calibre at the bar. The judicial office should be made attractive in itself and attainable only by those who are competent to fill it. To this end the judiciary should offer a life career in which the strength, dignity and emoluments of the position should increase with the merit of the incumbent. It has even been suggested that a hierarchy of courts might be established, beginning with justices of the peace and police magistrates and ending with the court of last resort, a hierarchy to which a young man could receive an initial appointment after a thorough preliminary training and after sufficient proof of character and ability, and through which he could rise to the top through merit and by

a constant exhibition of judicial ability. To accomplish such a reform is doubtless a task of great magnitude. In any jurisdiction it may involve the amendment of a mass of constitutional and statutory legislation and the overcoming of much lay and professional prejudice. It seems clear, however, that by such a system we can be well assured that the judicial branch of the government will be composed of men of the highest professional calibre. Whatever be our individual views on the method of attaining this end, however, one thing is clear beyond peradventure: It is today a paramount duty of the profession to devote its best and keenest intelligence and its most strenuous energies to improving the methods of selecting the judiciary.

The next step is to improve the methods of our judicial machinery. Lawyers spend their lives in solving other people's practical difficulties, and yet they admit, in seeming helplessness, that judicial procedure, which is only a means to an end, is allowed to defeat the very end which it has been established to accomplish. As a Nebraska correspondent remarks, "the present day procedure is out of joint with the times." It is time, therefore, that the solution of the problem should be essayed in earnest. The bar should study the practical administration of the law in other countries, including those in Europe. One of the difficulties with which we have to cope at the present time is the reluctance of the courts to exercise their powers outside of the forms which have been hallowed by custom, with the result that modes of possible and practical relief and many methods of determining litigation are not employed, and in these matters the experience of other countries will afford us valuable suggestions. These questions, however, should be attacked in a thorough and scientific spirit, in which the fundamental principles that should govern the presentation of a dispute of fact and law should be ascertained and applied. While seeking simplicity, however, we should not forget the necessity for orderliness. A procedure may be simple because it lacks orderliness, but such a procedure tends, as some of our cor-

respondents suggest, to produce slovenly lawyers. The whole problem is indeed of the utmost complexity.

The final step is to elevate the standard of judicial thinking. This is only another way of saying that we must improve the law itself. It is a problem that can solve itself only after the lapse of time. The best law schools, with their eager and insistent inquiry into principles and with the enthusiasm for principles which they instill into the students, are greatly helping; but even with their help, the higher standards are slow in coming. Our profession can, however, initiate a great reform at once; we can recognize that our present conceptions of the law and of legal principles are subject to improvement and that we are constantly acquiring a better understanding of them. We can recognize that the courts have been struggling in the dark quite as much as the bar, indeed, by reason of an inefficient bar, and that, being human, they too have often been in error. In other words, we can recognize that judicial decisions, even by courts of the last resort, may be wrong and ought to be changed, not by statute but by judicial decision. Subject to rights acquired upon the faith of erroneous decisions, it should be regarded by the profession and by the courts themselves as entirely proper for an advocate to point to judicial error in any decision which may be cited against him and to secure a reconsideration of any decision by submitting a respectful and lawyer-like argument in support of his position.

Indeed, to insist upon the reconsideration of erroneous decisions is more than proper; it is a legal duty which the lawyer owes to his client. The court is under a legal duty to litigants before it,—none the less legal because the material sanctions by which to enforce it are so conspicuous by their absence,—and it is the legal duty of the lawyer to do his utmost to secure the fulfillment of the legal duties which are owed to his client. It is one of the legal duties of the court to render its decisions *upon a sufficient reason*, and therefore it is one of the legal duties of the lawyer to see that the court has a sufficient reason for its decision. Consequently, when

the court is of last resort and its prior decisions are erroneous, it becomes not only the right, but also the duty, of the lawyer to present the arguments which shall lead to their correction, and thus assist in the advancement of the law as well as in the protection of the interests of which he is the guardian.

An illustration of what might be accomplished by means like these is afforded by the case of *Roberson vs. Rochester Folding Box Co.*,² in which the Court of Appeals by a bare majority of four to three overruled the unanimous opinion of six justices of the lower courts (one of them now on its own bench) and held that an injunction should not issue to restrain the unauthorized publication of the plaintiff's photograph as an advertisement. This decision elicited a storm of lay and professional protest. An editorial in the *AMERICAN LAW REVIEW* (vol. 36: p. 636) declared that it "shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret," and the New Jersey Court of Errors and Appeals referred to it as "a case seldom cited but to be disapproved."³ Its doctrine has been rejected in Georgia,⁴ and in Kentucky,⁵ and in New York its effect has been nullified by statute.⁶ Criticism like this is good for a court, and we should have more of it. The legislature, however, is in our view not the true corrective of such decisions. The most effective and the most lawyer-like method of meeting the situation which they create is, not to apply to the legislature to correct the court, but to appeal to the court to correct itself. Upon the very next occasion in which the decision is involved, the attorney against whom it is cited should examine the reasons which it contains, point to their insufficiency, and ask the court to recognize its error and amend it.

There is no assignable limit to the influence which a single

² 171 N. Y. 528.

³ *Vanderbilt v. Mitchell*, 72 N. J. Eq., 910, 919.

⁴ *Pavesich v. New England Life Inc. Co.*, 122 Ga. 190.

⁵ *Foster-Milburn Co. v. Chinn*, 120 S. W. Rep., 364.

⁶ *Laws of N. Y.*, 1903, ch. 132.

attorney may exert by the courageous assertion of his professional prerogatives in this regard. When one man has stepped forward to do it, others will be encouraged to join him, and thus a powerful engine for the betterment of the law will be set at work. The continuous pressure of competent professional criticism will stimulate the courts to a more careful performance of their functions. There are occasions however, when the single attorney cannot rely solely upon his own efforts, but needs assistance from his colleagues. It sometimes happens that a judicial decision is not merely erroneous, but is also a manifestation of passion, or prejudice, or even, unhappily, of corruption. In circumstances like these the single attorney is powerless, but the united bar can be an instrument of great efficiency. Under such circumstances the attorney should have an opportunity to enlist the aid of his fellow-members, and the bar as a whole owes a duty to the attorney to assist him. In order to meet this need and avail itself of its great powers, the bar should be organized throughout the country and every bar association should have a committee to which a lawyer who deems himself or his client to be aggrieved by improper judicial action can submit his cause, and when his grievance is well-founded receive its aid. Lawyers themselves are entirely competent to decide how such aid shall be granted, and therefore the method and procedure of common organization can well be left to their decision. It would be well for the bench to realize that those who are competent to criticize its decisions are organized and able to make their criticism effective. Perhaps the most immediate and perceptible improvement in the administration of the law can be attained by these means.

In Conclusion.

The natural limits of our task have prevented us from doing more than merely to outline the problem and to suggest paths of effort for improvement; but we have signally failed to achieve our purpose if we have obscured this fun-

damental fact: When all analyses are finished and all plans of reform are completed, we of the bar must admit our own responsibility for existing conditions. The bench comes from the bar, and the standards of the bench are ultimately the standards of the bar. We must therefore admit that our own standards, both intellectual and moral, are not yet the highest. We ourselves have not yet ascertained the fundamental principles of the law and we are still searching for them. We must therefore frankly strive to uplift our own standards. Reforms at home and abroad, however, may be contemporaneous, and so, while in the interests of our clients, ourselves and the general community we try to enlarge our own view, let us also ask the judges to join with us in a fraternal and powerful effort to achieve that highest interest of man on earth—the due administration of justice.

NEW YORK CITY.

EVERETT V. ABBOT.
CHARLES A. BOSTON.

THE DEVELOPMENT OF A SCIENTIFIC VIEW OF LAW.

In the last days of December of the year 1901 the French excavations under de Morgan on the site of Susa, the ancient fortress of the Persian kings, unearthed, probably for the first time in upwards of 2,000 years, a fragment of black diorite inscribed with columns of the ancient Babylonian, wedge-shaped hieroglyphics. A few days later two other fragments were found which, when joined to the first formed a block seven feet four inches high, five feet four inches in circumference at the top and six feet two inches at the bottom. We can imagine the enthusiasm with which this venerable monument was examined and its increasing depth when the examination disclosed the writing to be an inscription of the Babylonian Hammurabi, whose period is placed at about 2,250 B. C.¹ From their mountain seats in the country about Susa the Elamite bands were wont to make incursions into the fertile and rich plains of Mesopotamia between the Tigris and the Euphrates. It is supposed that as part of the fruit of some such incursion this stone was brought to Susa by one Sutruck-Nahunte in the neighborhood of 1100 B. C. However this may be we have reason to believe that about 4,000 years ago it stood in a prominent position in some town of Babylonia, probably Sippara. The inscription purports to have been made by Hammurabi and to consist of "the judgments of the land which I have pronounced," and "the decisions of the country which I have rendered," and to have been written as precedents for right decisions in the future.² The upper part of the monument

¹ Edwards, Chilperic, "The Hammurabi Code," P. 4, London, 1904.

² Harper, Robert F., "The Code of Hammurabi, King of Babylon," XI. Chicago, University of Chicago

Press, 1904. For the text of the Hammurabi Code see, in addition to Harper, Scheil, V., *Délégation en Perse*, Tome IV., *Textes Elamites Sémitiques*, Deuxième Série, Paris,

contains a representation of Hammurabi standing before Shamash, the sun-god, his right hand at his mouth, his left upon his waist and clothed in a long tunic hanging down in folds with a filleted cap upon his head. Shamash with flounced robe and swathed head covering is seated upon a raised dais. In his left hand is a wheel or ring, emblematic of the sun, as are also the rays behind his shoulders, and in his right hand an object which has been variously regarded as a sceptre or a stylus.³ This representation has been generally and probably correctly interpreted as intended to indicate the god as the inspiring source of the decisions recorded on the monument. The sun-god Shamash was the god of law and a "giver of decisions," and the gate or house of Shamash was the place where justice was administered. There seems to be good reason to believe from other recovered records that Hammurabi was an actual, historical person although the name Hammurabi, which appears to mean the great or extended people or gens is more like a collective appellation.⁴ At all events these decisions were all based upon existing customary law and were not in the nature of new propositions or a code, as they are sometimes referred to, and the Sun-god is pointed to as the source of these legal customs which are embodied in this the oldest digest of decisions of which we have any knowledge.

I have dwelt somewhat upon the Hammurabi inscription as a prominent example of how law is regarded among peoples in a stage of culture in which written records have not yet been or have but recently been introduced. It is, however, but one of many instances which might be cited. For example the laws of the Spartans which are described by later writers as the work of Lycurgus were believed by

1902, Leroux; *Records of the Past* (Washington), 1903, Vol. 2, 191; *American Journal of Semitic Languages and Literatures*, Oct., 1903. And for complete translations, in addition to the above, Winckler, H., *Die Gesetze Hammurabis*, Leipzig, 1903; Johns, C. H. W., *The*

Oldest Code of Laws in the World, Edinburg, 1903, and Edwards, Chlperic, *op. cit.*

³ Cook, Stanley A., "The Laws of Moses and the Code of Hammurabi," 4. London, A. and C. Black, 1903.

⁴ Cook, *op. cit.*

the Lacedaemonians themselves to be given them by Apollo.⁵ They were unwritten and largely consisted of metrical decisions or pronouncements, called *rhētrae*, the most important of which were said to have been delivered by the oracle of Apollo at Delphos.⁶ In fact Lycurgus himself may have been a local form of Apollo and not an historical person at all. Here again we have the Sun-god as the source of law.

Lycurgus was said to have derived some of his laws from Crete and Aristotle ascribes the Cretan laws to Minos but the Cretans themselves believed that they were received from Jupiter. They were entirely unwritten and of course what we know as customary law. At Rome the earlier customs, it was thought, were formulated by Numa and further that they were dictated to him by the goddess Egeria.⁷ In the homeric poems the decisions or judgments of kings or gods are called *Themistes* and are conceived as inspired by *Themis*, the goddess of law. In all these instances decisions or judgments are undoubtedly based on customary law, but the decision or the existence of the custom itself is explained as being the inspiration of a god. Early law thus appears closely associated with religion.

Law is as old as society; it has existed as long as society itself. It is one of the oldest of human institutions. The men of primitive societies had no such concept as making law. Recognizing the existence of law they sought an explanation of it and explained it as they did all the phenomena of nature and the institutions of humanity. The construction of a philosophy is engendered by the development of the concept of personality through the growth of what we call consciousness. When consciousness has become so developed that the notion of a conscious ego is fully formed all other phenomena are thought of in connection with it. The questions how and why spring up and here is the standard and starting point of investigation. The objective is

⁵ de Coulanges, *The Ancient City* (Small's Trans.), 252. Boston, Lee and Shepard.

⁶ Simcox, *Primitive Civilizations*, Vol. 1, 472, London, Swan Sonnenschein & Co., 1897.

⁷ de Coulanges, *op. cit.* 252.

explained by the subjective. The idea of personality prevades all thought. "Whatever happens, someone does it."⁸ The wind has voices, the trees murmur, the rocks and hills, the springs and rivers have all the qualities of human personality. Especially is this true of the beasts. They feel and think and know in human wise. But the characteristics of natural objects and the powers of the beasts seem superior to those of man. The irresistible rush of the storm, the sweep of majestic rivers, the power of the lion, the cunning of the fox create awe and wonderment. So the superhuman is born and anthropomorphic gods pervade all nature. The powers of nature come to inspire the greatest respect and adoration, and sun and moon gods, gods of the skies, the air and of the seasons are supreme. The next stage is the personification and deification of mental, moral and social qualities. Psychic characteristics are associated with the powers of nature and we have gods of war, of love and of hate. There is thus an evolution in mythologic ideas, but the different stages shade into each other and the lower co-exist to a large degree with the higher. So in the primitive philosophy of law legal institutions are explained as the work of the gods and Jupiter and Apollo, Themis and Egeria, inspire the judgments of priests and chiefs, councils and assemblies. Indeed disputes are often directly submitted to the decision of the gods, for the various modes of trial by ordeal are but the forms of procedure in the appeal to supernatural authority.

The next stage in the development of philosophy is that of the theory known as pantheism. Experience teaches that there is a regularity or uniformity in the phenomena of man's material environment. The notion of order in man's surroundings, in physical forces and to a lesser degree in animal life, develops. A great advance in generalization is thus made but the tendency to personification while largely

⁸ Powell, J. W., *Mythology of the North American Indians*. First Annual Report Bureau of Ethnology,

1879-80, 29 Washington, Government Printing Office, 1881.

escaped still leaves traces in the notion of the existence if not of a personality of a Power or immanent force initiating and controlling the changes and alterations, the genesis and existence of the material universe. As monotheism, in fact, the idea of personality persisted. Obscured for long in philosophical thought it was destined nevertheless later to play an important part in philosophical thinking and especially in the philosophy of law. But the human mind in its development and in the first conscious reasonings about phenomena to which we can give the name metaphysics rather than mythology, strove to escape from the idea of a purely personal agent as cause and to achieve a broader conception. We know more about the progress of these ideas with the Greeks than with any other people at this stage of development. This search for a cause or principle underlying the uniformities observed in man's environment resulted in the conceptions of Nature and the Laws of Nature, and whatever appeared in all around as the product or manifestation of order and regularity was classed as natural phenomena and, as a later development, normal as distinguished from what appeared capricious or irregular.⁹ How fruitful this conception was in the study of the physical universe we know and realize more fully when we recall the use still made of such terms as "nature," "natural laws," "natural philosophy," etc., although of course these terms have persisted by no means unchanged in significance. The conception of nature was also of course applied to man and his institutions, to human society and human laws. It here readily becomes associated with the concept of reason. Through reason man, himself a part of nature, may discover natural law. Pre-eminently in the stoic philosophy were these ideas developed and passing over into the jurisprudence of Rome the notion of the law of Nature underlies all subsequent legal philosophy, the term itself as *Natur-recht* or *Droit-Naturel* being indeed that in common use to desig-

⁹ Bryce, James, "The Law of Nature," *Studies in History and Jurisprudence*, 559-569. New York, Oxford University Press, 1901.

nate the philosophy of law.¹⁰ In two instances the notion had a considerable effect on law in the concrete as well as in the abstract realm. The first of these was the *jus gentium* of the Romans. Long after the time when Rome had stretched her power and influence over a large part of the antique world of which she was in later times to be known as the mistress, the principles of blood relationship, universal in primitive societies, retained a large influence in the Roman legal system. These principles governed the qualifications of citizenship, being only very gradually supplanted, and only to Roman citizens did the laws of Rome apply. Yet Roman citizens came into contact with strangers and aliens and the Roman courts were forced to do justice between them and between the aliens themselves. For this purpose they sought those principles which were generally observed in all those communities or nations with which they came into contact or which they knew. Thus there grew up a body of law which they called *jus gentium*, the law of the nations. This law of the nations was considered to be common to all mankind, dictated by natural reason and founded upon the law of nature.

The other is the influence it had on the conception of the early theorists on international law. Grotius, Puffendorf, Hobbes, Wolfius and other early writers on the law of nations look to the law of nature for the principles which should govern the relations of states to each other. Upon the law of nature and upon consent they found their theories of international law. Some place more emphasis upon one of these foundations, others upon the other. Grotius himself, said: "When several persons, in various times and places maintain the same thing as certain; this ought to be referred to a general cause. Now in questions of this kind, the cause can only be attributed to the one or the other of these two, either a just consequence drawn from natural principles or an universal consent. The first discovers to

¹⁰ Dunning, William A., *Political Theories, Ancient and Mediaeval*, 104. N. Y. The MacMillan Company, 1908.

use the law of Nature and the other the law of nations."¹¹ The co-existence of these two ideas appears equally in the Roman *jus gentium*. Its rules were actually and avowedly customs common to various communities. It was a law by virtue of being custom but resting nevertheless upon and explained by the law of nature. So with all primitive law. It is everywhere recognized as custom and existing by common consent. The Greeks called law "custom" and "common agreement" and the early Roman law was purely customary.¹² But an explanation was sought back of all this and in the same manner as the ancients had referred the origin of customs to gods and deified ancestors, later philosophers sought for the reason back of the custom and referred it to the law of nature. The association of natural law with right reason furnished an explanation of the existence of customs peculiar to particular communities and of measures instituted by the common consent or general initiative of a community. As natural law may be known by reason laws may be established by the common consent or agreement of those to whom they apply. Thus the peculiar circumstances of a community may develop appropriate customs and even new laws be instituted by the general agreement. The increasing complexity of life in communities in which commerce rapidly developed and consequently contract and agreement became of growing significance, and their change from a kinship to a territorial system of organization with the other changes co-incident therewith, stimulated and accelerated the growth of customs to govern the novel instances incident thereto. Moreover the contact of differing people in commerce, the superposition of conquering or immigrant upon vanquished or stationery groups operated to the same effect. An explanation for the more rapid growth of law had to be found and this the identification of reason with the law of nature furnished.

Along with the development of commerce the growth of

¹¹ Grotius, *Prolegomena to the De Jure Belli ac Pacis*, sec. 41.

¹² See James Wilson, *Works*, An-

draws ed. Vol. 1, 89. Chicago, Callaghan & Co., 1896. Papinian, *Dig.* 1, 3, 1.

war profoundly affected both the actual evolution of social organization and legal institutions and the theories of them. Feudal systems of social organization in which war was the large determining element were the transition stages between the older kinship and later territorial systems of society. Society in Europe for centuries had a military tinge. The development of the notions of representation and authority together with the territorial form of organization mark the development of the notion of the State. These had always existed in germ but they required a long period of growth before they influenced to any extent legal ideas. As early as the days of the republic in Rome the explanation of the existence of custom as a product of reason and therefore of natural law, had developed the idea that the approval of the people of measures might be as well expressed by voting as by long-continued acquiescence. The next step was to recognize that instead of the whole people signifying its assent by voting they could select persons to exercise for them their prerogative and duty of determining upon measures. This would seem to be the starting point of political institutions. Feudal systems in the manner in which they preserved the old ideas of personal relationship and connection assisted in the growth of this idea of representation. During all the days of Rome however the concept of the binding force of laws was the approval of the people, either expressly given by voting or by practice and acts, i. e. customs. This is the theory even of Justinian's Institutes and Digest although as a fact the Emperors had then for centuries actually exercised what we would call legislative power. They did so on the theory of a delegation from the people, not to the office or permanently but to each individual Emperor and theoretically as a temporary and extraordinary measure. The old republican constitution was never abrogated and after the death of Caligula it was for a time proposed to proceed in

strict accordance with it.¹³ The authority of the Emperors therefore was regarded as extra-legal if not illegal—almost as were previously the tyrannies in Greece. In fact it was military in its nature and indeed the questions which we would term political arose in and through war and were first essentially military questions.

Christianity, embodying Jewish Monotheism, became the religious belief of Europe and strongly developed the idea of authority. The ecclesiastics identified the law of nature with the law of God and explained both uniformities of natural phenomena and human institutions as the work and pleasure of a personal deity. Authority and force according to the concepts of this philosophy were the highest law both on earth and in heaven. Militarism and Monotheism gave birth to government and the modern state. Henceforth the fundamental conceptions of law are interwoven with those of government. Throughout the middle ages this evolution continued. But the renaissance and the reformation marked a period of recasting of theories and development of thought. The theological theory finally culminated in the dogmas of the divine right of kings and the sanctity of obedience, but these ideas began to be questioned with increasing earnestness. Associated with the notion of the law of nature there arose the conception of a state of nature in a way somewhat similar to the old idea of the golden age. As set forth by Voltaire, Rousseau, Hobbes and others, this theory projects man as he is, or is supposed to be, contemporaneously back into a period antedating history. The method of discovering what he was and did in this state of nature was that of subjective inference and theory and the characteristics of this "natural man" were therefore as varied and various as the tastes or fancies of the theorists. Society was supposed to be instituted by a convention or contract between men in a state of nature but the nature of this "social contract" was also variously regarded according to the political views of

¹³ Bryce, "The Nature of Sovereignty," *Studies in History and Jurisprudence*, 525.

the philosopher. With Hobbes, men in their natural state are in incessant war and strife with each other to terminate which they agree with each other to surrender their natural rights into the hands of a monarch whom they thereby irrevocably become bound to obey in all things. He confines natural law to the state of nature and derives all civil law from the will of the sovereign instituted by the social compact, for by the social compact men have agreed to obey the sovereign and "where we are tied to obedience before we know what will be commanded of us there we are universally tied to obey in all things."¹⁴ The very object of civil laws, he says, is to restrain the liberty to which man is entitled by virtue of natural law yet as the law of nature commands covenants to be kept it requires man to obey the civil laws instituted for the purpose of depriving him of the rights which are his by virtue of that law itself. Nevertheless he says that the obligation of subjects to the sovereign lasts only so long as the sovereign retains the power to protect them and that to those whose power is irresistible the dominion of all men adhereth naturally by their excellence of power; thus basing the state and law, as he makes law only the command of the sovereign, upon force.¹⁵ Essentially it is a political theory and with a political object, namely to shore up monarchical institutions by endeavoring to find a legitimate basis for them. Hobbes by his distinction between natural and civil law makes all law political. It was not necessary for his purpose to do this and not all of the supporters of the political theory of monarchy do it. Spinoza for example derives the institution of political authority from contract but recognizes that natural law exists even in the civil state. According to him the sovereign has the right to rule only so long as it actually has power to do so, thus founding government solely upon force.¹⁶

¹⁴ Hobbes, *Philosophical Rudiments Concerning Government and Society*, Chap. XIV, sec. 10.

¹⁵ Hobbes, *Leviathan*, Chap. XV-XX.

¹⁶ Spinoza, *Tractatus theologicopoliticus*. (Bohn's Trans.) Chap. XVI.

Hobbes is followed by Puffendorf in regarding law as nothing but the command of the sovereign. He, however, distinguishes three separate and distinct social contracts yet still mutually connected and dependent. The first is an agreement of those associating whereby society itself is formed for the common benefit. The second is an agreement whereby a certain form of government is instituted in this society. The third is an agreement between one or some of the citizens on the one hand who assumes the sovereignty and the rest of the citizens on the other who confer the sovereignty upon him.¹⁷ Substantially the same theory of law was maintained by Barbeyrac, Grotius, Burlamaqui, Heineccius, Wolfius and others and from them Blackstone derived his definition of law in the Commentaries.

The real development of the contract theory was along different lines. Hooker in England in the 16th century, traced the origin of all government and law to the consent of the people.¹⁸ Locke while he postulated a state of nature and conceived the state as originated by a compact between individuals in which they surrendered certain rights nevertheless maintained that man retains his natural rights after the creation of the state, and that the state is created for the very purpose of protecting these and instead of being absolute and independent of the rights of individuals is limited by them. The governmental authority is delegated by the people as a trust and when abused may be resumed.¹⁹ The name of Rousseau is pre-eminently associated with the theory of the social contract. With him society and state are practically the same but are sharply distinguished from government. The state is established as "a form of association which shall defend and protect with the public force the person and property of each associate, and by means of which each, uniting with all, shall obey, however, only him-

¹⁷ Puffendorf, *De Jure Naturae et Gentium* (Kennett Trans.), VII, 2. London, 1729.

¹⁸ Hooker, *Ecclesiastical Polity*. (Morley ed.) London, 1888.

¹⁹ Locke, John, *Two Treatises of Government*, 11. (Morley ed.) London, 1887.

self, and remain as free as before."²⁰ It is instituted by the social contract by which each person "gives in common his person and all his power under the supreme direction of the General Will, and receives again each member as indivisible part of the whole."²¹ Government is not instituted by a contract but is purely a delegation of authority by the people who compose the state and who as such are sovereign and which may be changed or taken away at pleasure. Law rests on the assent of the people according to Rousseau or rather upon the will of the people as sovereign—the General Will, as he phrases it—and this will can be expressed not through representatives but only by the whole sovereign people.²² As thus shaped by Rousseau the theory of natural law and the social contract had a wide influence. It was the basis of the Declaration of the Rights of Man made by the French Convention in 1789. It strongly influenced the German publicists of the period. It reached America and permeated the Declaration of Independence of 1776. It became in fact a part of popular thought. It underlies the ethical and political theories of Kant, Fichte and Hegel. Kant accepts the social contract as the act whereby society or the state is instituted or as he puts it "the idea of that act," and defines law as "the sum total of the conditions under which the personal wishes of one man can be reconciled with the personal wishes of another man in accordance with a general law of freedom,"²³ while for Hegel law is "the actual body of all the conditions of freedom," "the realm of realized freedom, the world of mind produced out of itself, as a second nature."²⁴

²⁰ Rousseau, *Social Contract*, Bk. 1, Chap. VI.

²¹ *Idem*.

²² *Idem*, Bk. 11, Chap. IV.

²³ Kant, *Rechtslehre*, Werke, VII. "Der Inbegriff der Bedingungen unter denen die Willkür des Einen mit der Willkür des Anderen nach einem allgemeinen Gesetze der Freiheit vereinigt werden kann."

²⁴ Hegel, *Philosophie d. Rechts*, sec. 4. For summaries of the va-

rious theories referred to above see Dunning, William A., *Political Theories from Luther to Montequieu*, N. Y., 1905; Willoughby, W. W., *The Nature of the State*, N. Y. and London, 1896; Bosanquet, Bernard, *The Philosophical Theory of the State*, London, 1899; Bluntschli, J. K. *The Theory of the State*, Oxford, Clarendon Press, 1901; Wilson, James, *Works*, (Andrews Ed.), Chicago, 1896.

In America not only the Declaration of Independence but the constitutions of the various states and of the United States are largely based on the natural law and social contract theories substantially as stated by Rousseau and they appear in the writings of Jefferson, Madison and other of our early publicists.²⁵ In fact they largely enter into our settled theory of society and government. James Wilson, one of the framers of the constitution and judges of the supreme court derives law from the consent of the people either by themselves or through their representatives, thus admitting the principle of representation. Society is founded on contract but government is simply a delegated authority from the people which continues sovereign and may limit, change or revoke its grant.²⁶ He refutes the political theories of Blackstone and Puffendorf in a masterly way. It is strange that this refutation should have so little general appreciation in this country and the political theories of Blackstone which there seems good reason to believe were largely colored by his views and the views of Mansfield of the American revolution should be so largely taught as fundamental principles although directly opposed to the principles at the basis of our government.

They were revived however by the so-called Analytical school in England as exemplified in Bentham and Austin who although they criticize Blackstone do not get beyond him in the construction of a legal theory. Bentham was primarily a social reformer. He reduced ethics to what he called the principle of utility, "the greatest good to the greatest number." He adopted the definition of Hobbes and his followers of civil law as being the command of the sovereign power as his definition of all law denying altogether the existence of natural law. The decision of cases in courts of law according to legal rules he characterized as "a wilful falsehood having for its objects the stealing of legislative power by and for hands which could not or

²⁵ Willoughby, W. W., *op. cit.*, p. 87.

²⁶ Wilson, *op. cit.*

durst not openly claim it."²⁷ Austin follows Bentham in his definition of law but asserts that judges make the law by which they decide cases but that such "judge-made law" is the act of the sovereign through the power delegated to the judges by reason of their office.²⁸ The analytical school, as they do not admit the social contract theory, found law solely upon force. I have thus endeavored to indicate types of the views about law prevailing at successive periods.

This hasty sketch of the opinions about law, imperfect as it is, may serve to indicate that the philosophy of law is but a special case of mythology and metaphysics. That is that the philosophy of law has been but general philosophy applied to law and is characterized by all the errors and imperfections embodied in the successive mythological and metaphysical theories which have arisen as explanations of material phenomena and human institutions. The most common error encountered is what Powell has termed "imputation,—the referring of observed phenomena to wrong causes."²⁹ For example take the wind: it is like the breath or the effect of the flapping of a bird's wing and here are wrong causes imputed. But what breathes or flaps its wings? Imputation suggests a God or a great sky-bird. In the same manner laws, customs and decisions are imputed to Gods. In mythology the confusion between thought and force is common. The savage believes that he can think arrows to the hearts of his enemies, our ancestors not so many generations ago believed that witches could think bodkins into the bodies of those they wished to torment, and there are many people today who believe that they can destroy or repair the tissues of the human body by thought. Aristotle derived all the other properties of bodies from force and in the modern phase of this theory known as materialism the totality of phenomena including thought is resolved into force or mo-

²⁷ Quoted in Carter, James C., *Law Its Origin, Growth and Function*, p. 181.

²⁸ Austin, John, *The Province of Jurisprudence Determined*.

²⁹ Powell, J. W., *Sophiology*, *American Anthropologist*, N. S., Vol. 3, 54.

tion. It is not surprising therefore to find theories deriving law from force. Bound up with the theory of natural law was the theory of intuitive ideas. Precisely as the belief once obtained that animals and plants were created in certain fixed and definite classes known as species and perpetuated themselves as such, growth only occurring in the individual and not in the race, so it was thought that there were created specific ideas or forms of ideas and that ideas grow only in the individual.³⁰ This doctrine of innate ideas is included in the system known in modern times as Idealism, which conceives all phenomena as being the product of mind according to one school and of will according to another. It is the system of Kant, Fichte, and Hegel among others. One or another of these imperfections underlie all metaphysical thinking and vitiate it from the standpoint of science. Verification is the distinguishing feature of science. It employs observation, inference and verification. Science is not satisfied to assume premises but first must come accurate observation of the phenomena and finally the inferences therefrom must be verified.

Science is as old as thought and may be traced through all the history of thought yet it is only in quite recent times that it has overshadowed other systems of thinking in general recognition. Even yet we have but the beginnings of a science of law. The formulation of the theory of evolution profoundly stimulated scientific thought. The idea of a causal connection between present and past phenomena and of a successive development from the past to the present co-ordinated many hitherto seemingly unrelated facts and opened new vistas of generalization. The immediate stimulus was in the science of biology due chiefly to the work of Darwin, but the influence spread through all the sciences and a most powerful impulse was communicated to anthropology. The year (1859) which saw the publication of Darwin's discoveries on the origin of species also witnessed the bringing to light of the paleolithic implements found by Boucher de

³⁰ Powell, *Sophiology*, p. 60.

Perthes in the valley of the Somme, attesting the high antiquity of man. The acceptance of the theory of evolution superseded all theories of the creation of species in fixed and unchangeable forms and cleared the ground for the idea of mental development in the race. Herder had already caught a glimpse of continuity of development in culture between the primitive and the civilized races of man, and upon the evolutionary basis attempts were made to construct a theory explicative of all observed social phenomena as being a development according to a general type from the primitive to the modern. Spencer and Tylor are prominent examples of the pioneer workers in this field, but the general view came to be a common platform for all generalization in the mental sciences. The concept of the essential unity of the human mind and its similar behavior under similar environmental stimuli was developed. With the German anthropologist Bastian this underlying idea took the form of a theory that there are certain "elementary ideas," as he called them, universal to one species and which cannot be further investigated in origin. These may be discovered and their modification by diverse environments traced.³¹ In Bastian's theory and still further in that of Gerland, who regarded the elementary ideas as formed in an early stage of a common primitive culture, there is a dangerous approach to the ideology of philosophical systems, but by Brinton who was an extreme exponent of the notion of the psychic unity of the human mind, this danger is avoided by a development of the principles of ethnic psychology, as will be presently pointed out.

These general lines of thought were applied in the study of some of the chief institutions of man, notably social organization, marriage, language, religion and more recently, property or ownership. The study of language has been especially successful and the classification of languages has so far been the most satisfactory method of classifying man

³¹ Boas, Franz, *The History of Anthropology*, Science, N. S., Vol. XX, 513.

himself. In respect of social organization its evolution through certain typical stages and forms is fairly well established. Lewis H. Morgan, who began his studies upon the Iroquois, gathered together the observations upon a large number of the most diverse peoples and systematized them in his "Ancient Society"³² and other works. Major Powell and his associates of the Bureau of Ethnology in their studies of the Amerinds have accumulated observations of inestimable value for the study of institutions and contributed theoretical treatments of the material. A science of society under the name of Sociology is now recognized. The professed sociologists have been largely influenced by the older philosophical ideas but the tendency is toward the increasing use of scientific methods. Except for social organization, marriage and property, however very little application of the results of anthropology has been made to the institution of law. So far are we from yet having a science of law that one of the most eminent of modern legal writers, Sir Frederick Pollock, doubts whether in the present state of our knowledge we are able to define what law is.³³ On the whole the force theories have dominated in recent times, perhaps largely due to a greater definiteness and cock-sureness than the natural law theories and a certain applicability to modern political theory. Anthropologists have not been students of law except as their studies of primitive peoples impinged on it and have looked to legal authorities for their ideas of the general nature of law. Brinton follows Blackstone in a general way and defines law as "that restraint exercised by the group on the individual which in its last recourse is backed by physical force."³⁴ He therefore does not include "Social Relations" under the term "Law." Even Powell is affected by the force theory, defining law as "the rule of action which the community endeavors to enforce."

³² New York, 1877.

³⁴ Brinton, D. G., *The Basis of Social Relations*, N. Y. 1902, p. 168.

³³ Pollock, Sir Frederick, *First Book of Jurisprudence*, p. 4, Second Ed. London, 1904.

On the other hand legal theorists have paid but little attention to the results of anthropological research. Montesquieu in his *Spirit of Laws*, published in 1748, collected together a mass of instances of laws in the concrete from all countries and largely deduced his legal theories from them. But the attempt to found legal theories on fact instead of on speculation was too far in advance of the thought of the period and Montesquieu's definition of laws as the necessary relations of beings among themselves evoked no appreciation more intellectual than amusement. Anthropological theories however had a considerable influence upon historical research and the historical method was adopted by some legal theorists and profoundly affected their view of law. Sir Henry Maine in his *Early Law and Custom* remarked:

"There is such a widespread dissatisfaction with existing theories of jurisprudence, and so general a conviction that some line of inquiry necessary to a perfect result has been incompletely followed or altogether omitted by their authors. And indeed there is one remarkable omission with which all these speculations are chargeable, except perhaps those of Montesquieu: They take no account of what law has actually been at epochs remote from the particular period at which they made their appearance."

Maine's historical studies in the Roman law are admirable illustrations of the fruitfulness of this method. Savigny perhaps was the real introducer of the historical method into legal studies. He and his followers investigated the history of the Roman law primarily but it was not long before these investigations were extended to the Germanic, the Slavonic and Celtic laws and to the laws of India. The Germans were the pioneers in this field, being indeed the first to initiate a thorough historical investigation even of English and Anglo-Saxon Law. Brunner, Maurer, Phillips, Nasse and Schmidt may be mentioned and even now the best edition of the Anglo-Saxon laws is that of a German, Prof. Liebermann. The stimulus of the works of these authors however was soon felt in England and the names of Pollock, Maitland,

Stubbs, Jenks and a host of others stand for sustained and brilliant labor and achievement in the delineation of the history of English law; while the publications of the Selden and Camden societies indicate the extent of the general interest which has been aroused, and in America Professor Thayer and Professor Wigmore have made some use of the historical method even in the professional treatise.

The interest awakened in the ancient nations of the East by the archaeological discoveries in Babylonia, Egypt and Palestine has ensured some attention being paid to their laws. Here again the Germans are in the lead as witness the names of Kohler, Peiser, Winckler, Meissner, Schrader, Strasmaier and others; though of perhaps equal value is the work of Revillout, Oppert, Scheil, Stevenson, Pinches, King, Thureau-Dangin, Radau and Harper among many scholars at work in this field.

The extension of the field of these historical studies prepared the way for a study of the laws of all the peoples of the earth as a necessary foundation for the discovery of the history and growth of legal institutions in general. This step seems to have been taken however only in Germany. Judge Albert H. Post of Bremen proposed such a study and for it the title of *Ethnological Jurisprudence*. He would have this science collect and describe the laws and customs of all nations and peoples of the earth as the material from which to draw inferences and conclusions as to the "Jural Sense" of mankind. He points out that individual psychology is inadequate to explain the phenomena of law and society since the individual consciousness contains but a portion of our psychic activity. The underlying causes of social phenomena must be sought in a study of those phenomena themselves as expressed in customs, laws and conduct generally, and as the products of a group consciousness or psychic activity of which the individual mind is not conscious, and which can only be studied in its manifestations, that is, in the conduct of groups. The scientific study of law therefore must proceed as a study of customs and the actual conduct

of peoples or groups and that is what law amounts to in the last analysis.³⁵ This result is also arrived at by that eminent American legal student James C. Carter, in his course of lectures prepared for delivery in the Harvard Law School and published under the title "Law; its origin, growth and function."³⁶ Mr. Carter upon an examination of laws as manifested in both primitive and civilized societies concludes that "human conduct is in a very large degree self-regulating" and that law is "the form in which human conduct—that is, human life, presents itself under the necessary operation of the causes which govern conduct." Law therefore is custom. For the origin of custom, however, Mr. Carter refers us to individual psychology, except for invoking the principle of the unity of the human mind and its uniformity of action under similar environments. In this respect he has not advanced as far as Post. The ethnic or group psychology which was applied to legal science by Post, this application being, I venture to think, the final prerequisite to the foundation of a true science of laws, was developed by a number of thinkers mostly Germans, of whom Lazarus, Steinthal, Tarde, Stoll and Wundt are pre-eminent. Dr. Brinton, especially in his work, "The Basis of Social Relations," has further developed the theory of group psychology. "The ethnic psyche," he says, "is made up of a number of experiences common to the mass, but not occurring in any one of its individual members. These experiences of the aggregate develop their own variations and modes of progress, and must be studied for themselves, without reference to the individual, holding the processes of the single mind as analogies only."³⁷

Complementary to the historical method therefore we have the anthropological, only awaiting a further applica-

³⁵ Post, A. H., *Grundriss der Ethnologischen Jurisprudenz; Die Grundlagen der Rechts und die Grundzüge seiner Entwicklungs-geschichte; Ethnological Jurisprudence, The Monist*, Vol. 2, p. 31;

Introduction to the Study of Ethnological Jurisprudence, The Open Court, Vol. XI, p. 641.

³⁶ New York, 1907.

³⁷ Brinton, D. G., *The Basis of Social Relations*, XIII.

tion to legal studies. The fruitfulness of the historical method foreshadows what we may expect from the anthropological. Together they furnish the basis for a science of law.

Nothing more adequate than this hasty glimpse of the beginnings of scientific work in the field of law can be attempted in this place, still less is it here possible to survey what has so far been accomplished through the scientific view of law. The most important thing is that a scientific method of investigation has been established. Much valuable data has been accumulated and the general notion of the growth and evolution of social and legal ideas and institutions as expressions of them has been widely accepted. The way has been opened not only to investigations of the history of legal ideas but into their origins as well. We propose to investigate the origin of even the elementary ideas and I venture the assertion that at least they may be reduced to as few as two: The idea of physical or blood relationship and the idea of contract or agreement. Sir Henry Maine characterized the development of law in a happy phrase as being an evolution from status to contract; and if we broaden somewhat his definition of these two terms his characterization remains eminently true.

By the determination that there is verily a science of law what a vista is opened up for our contemplation. No longer need we regard it as the arbitrary and uncertain product of mere force or violence, but confident that it is the product of general and universally valid principles we may seek by a survey of its many and varied manifestations to discover the underlying uniformities.

WARREN, PENNSYLVANIA.

EDWARD LINDSEY.

THE LAWYERS OF CHARLES DICKENS.

A century ago next February there was born into the world one of the most remarkable humanists that ever lived,—a humanist, not in the cause of philanthropy or social science, but in that wider sphere of creating through a superb art a fanciful folk-world of undying and unmitigated delight. Never was there a greater literary debt for human gratitude to pay than that which three generations at least of the English speaking race owe to Charles Dickens. Two great countries are indebted to this master of human observation for the saving grace of national humor. Most of us are taught its appreciation almost at our mother's knee. We later revel in its wholesome, untainted unction until unconsciously some measure of his sense of humor, his wonderful sympathy, his point of human observation, is woven into the warp and woof of our lives and character.

It is always, with Dickens, as it should be with all true and great novelists, the characters that stand out in living memory,—not so much the language used—still less the story. It seems more true of him than of any other writer, because no one else has ever got quite so dramatically close to the secret foibles of the human heart, and held them up in such a grotesque way as to delight us, rather than disturb us. Although we laugh, we know what he means, and we quietly fold the eternal lesson of its verity into our secret consciousness. It is rare to find a lawyer who does not admire Dickens. No one better than he appreciated the dramatic value of a legal atmosphere. There are few of his books that do not possess it in some degree. He seldom treats us kindly—and yet we, as a profession, are the more appreciative of his art because we come more in contact with the real drama of human weakness and better understand his point of view.

Still, Dickens was not a lawyer. His legal experience was largely obtained as an obscure under-clerk in the office of

a Mr. Blackmore, a solicitor. He was only fifteen years old. An alert mind is always most susceptible to impressions at that age—and in the case of this great humanist of the imagination, the sights and sounds of the routine of legal machinery sunk deep; thus the background of legal atmosphere in his novels is easily explained.

Dickens had not a legal mind in any sense. One finds no legal problems of any moment either seized on or worked out in his books. But no man ever lived and wrote who possessed a more acute sense of the dramatic possibilities, or a more humorous and sensitive perception, of the weaknesses and foibles of a lawyer's life. His days were spent among the dramatic types and figures of the law courts, and his nights in the laborious process of self-taught stenography,—with such results, indeed, that it was said “there never was such a shorthand writer.”

After two years in the solicitor's office, Dickens started in as a reporter of speeches in the House of Commons, and later in the House of Lords. While his pencil flew to the dull rhythm of some lord's tedious verbosity, the sub-conscious sensitive plate of his perceptions must have been busy taking on some of the impressions he later furnished so lavishly to an admiring world of readers.

He was always on the lookout for queer people, and as he had little reverence for the law, what wonder that he rarely treats with kindness the vain, weak, grasping, pompous humbugs he saw about him in his goings and comings at Mr. Blackmore's office and from the dimly lighted reporters' gallery of Parliament? These puppets of the big wigged bench and busy bar were capital material, if the truth must be told, and one can only marvel at the artist's unerring skill and infinite variety. Of course, American lawyers are not so free from foibles as not to appreciate to the full Dickens' conception of our cousins across the sea. In fact, there is hardly a picture or a line that does not find its counterpart right at any bar. Dick-

ens' sense of human nature is broad. Its range is very wide; and its course is aglow, even in this day and generation, with the light of one of the keenest observers that ever set watch upon the ways of men.

These lawyers of Dickens are for the most part minor characters. But as Chesterton truly says, "Dickens not only conquered the world, he conquered it with minor characters."

Taking the books as they appear in chronological order, the most normal, everyday, common-place type of lawyer that Dickens ever drew is found in that incohesive mine of delight, "The Pickwick Papers"—where one would naturally look only for the fantastic and the bizarre.

"He was a little, high-dried man, with a dark, squeezed-up face, and small, restless, black eyes, that kept winking and twinkling on each side of his little inquisitive nose, as if they were playing a perpetual game of peep-bo with that feature. He was dressed all in black, with boots as shiny as his eyes, a low white neck-cloth, and a clean shirt with a frill to it. A gold watch chain and seals depended from his fob. He carried his black kid gloves in his hands, not on them; and as he spoke, thrust his wrists beneath his coat-tails with the air of a man who was in the habit of propounding some regular posers."

There we have Mr. Perker of Gray's Inn, and can well imagine the keen satisfaction that Dickens must have picked out this description from the storehouse of his memory as underclerk in Mr. Blackmore's office. It does not matter that Perker is the attorney of the choleric Wardle on the trail of the scamp Jingle—and that through that artfully managed encounter, he subsequently became counsel for Mr. Pickwick,—that man "of god-like gullibility," as he has been called. Perker could manage an election, too, with much ability. No one could say but what he was useful, energetic and resourceful.

Mr. Pickwick arrives at Perker's office after his friends had been subpoenaed in *Bardell v. Pickwick*, just in time to witness the pathetic putting-off of Watty, the bankrupt, by the diplomatic clerk, Lowten. Watty, a "rustily-clad, miserable looking man, in boots without toes, and gloves

without fingers," had just been falsely told that Mr. Perker was not in.

"Step in, Mr. Pickwick," said Lowten. "Well, will you leave a message, Mr. Watty, or will you call again?"

"Ask him to be so kind as to leave out word what has been done in my business," said the man; "for God's sake, don't neglect it, Mr. Lowten."

"No, no; I won't forget it," replied the clerk. "Walk in, Mr. Pickwick. Good morning, Mr. Watty; it's a fine day for walking, isn't it?" Seeing that the stranger still lingered, he beckoned Sam Weller to follow his master in, and shut the door in his face.

"There never was such a pestering bankrupt as that since the world began, I do believe!" said Lowten, throwing down his pen with the air of an injured man. "His affairs haven't been in chancery quite four years yet, and I'm d—d if he don't come worrying here twice a week. Step this way, Mr. Pickwick. Perker is in and he'll see you, I know. Devilish cold," he added pettishly, "standing at that door wasting one's time with such seedy vagabonds!"

How pathetically true this little touch is, we all know. And yet Perker is not intended at all as an ungracious or unkind practitioner. And we as lawyers, alas, know that he is not an unusual one, even today.

Perker, too, has the strongest possible admiration for Dodson & Fogg,—quite characteristic of the hustling little solicitor,—and it rather annoys Mr. Pickwick.

"They've not been sleeping, I know that. Ah, they're very smart fellows,—very smart, indeed."

"As the little man concluded, he took an emphatic pinch of snuff, as a tribute to the smartness of Messrs. Dodson & Fogg.

"They are great scoundrels," said Mr. Pickwick. "Aye, aye," said the little man; "that's a matter of opinion, you know, and we don't dispute about terms; because, of course, you can't be expected to view these subjects with a professional eye."

The layman's view on the professional etiquette of Dodson & Fogg had already been announced by Sam Weller:

"And of them Dodson & Fogg as does these sorts o' things on spec, as well as for the other kind and gen'rous people o' the same purfession, as sets people by the ears free gratis for nothin', and sets their clerks to work to find out little disputes among their neighbors and acquaintance as vants settlin' by means o' lawsuits,—all I can say o' them is, that I vish they had the reward I'd give 'em."

One cannot omit certain little illuminations from the famous trial—"the numerous muster of gentlemen in wigs

in the barristers' seats, who presented, as a body, all that pleasing and extensive variety of nose and whisker for which the bar of England is so justly celebrated."

"'Who's that red-faced man, who said it was a fine morning, and nodded to our counsel?' whispered Mr. Pickwick.

"'Mr. Serjeant Buzfuz,' replied Perker. 'He's opposed to us; he leads the other side. That gentleman behind him is Mr. Skimpin, his junior.'

"Mr. Pickwick was on the point of inquiring with great abhorrence of the man's cold-blooded villainy, how Mr. Serjeant Buzfuz, who was counsel for the opposite party, dared to presume to tell Mr. Serjeant Snubbin, who was counsel for him, that it was a fine morning, when he was interrupted by a general rising of the barristers and a loud cry of 'Silence' from the officers of the court. Looking around he found that this was caused by the entrance of the judge."

What lawyer, too, fails to appreciate the following:

"'Bardell and Pickwick,' cried the gentleman in black, calling on the case which stood first on the list.

"'I am for the plaintiff, my Lord,' said Mr. Serjeant Buzfuz.

"'Who is with you, brother Buzfuz?' said the judge. Mr. Skimpin bowed to intimate that he was.

"'I appear for the defendant, my Lord,' said Mr. Serjeant Snubbin.

"'Anybody with you, brother Snubbin?' inquired the court.

"'Mr. Phunky, my Lord,' replied Serjeant Snubbin.

"'Serjeant Buzfuz and Mr. Skimpin for the plaintiff,' said the judge, writing down the names in his note book, and reading as he wrote, 'for the defendant, Serjeant Snubbin and Mr. Monkey.'

"'Beg your Lordship's pardon, Phunky.'

"'Oh, very good,' said the judge. 'I never had the pleasure of hearing the gentleman's name before.' Here Mr. Phunky bowed and smiled and the judge bowed and smiled, too, and then Mr. Phunky, blushing into the very whites of his eyes, tried to look as if he didn't know that anybody was gazing at him; a thing which no man ever succeeded in doing yet, or, in all reasonable probability, ever will.

"'Go on,' said the judge."

Perhaps a word should be said to recall Mr. Serjeant Snubbin:

"a lantern-faced, sallow complexioned man of about five and forty, or—as the novels say—he might be fifty. He had that dull looking boiled eye which is so often to be seen in the heads of people who have applied themselves during many years to weary and laborious courses of study. . . . His hair was thin and weak, which was partly attributable to his having never devoted much time to its arrangement, and partly to his having worn for five and twenty years the forensic wig which

hung on a block beside him. . . . Books of practice, heaps of papers and opened letters were scattered over the table without any attempt at order or arrangement; the furniture of the room was old and rickety; the doors of the book-case were rotting on their hinges; the dust flew from the carpet in little clouds at every step; the blinds were yellow with age and dirt; and the state of everything in the room showed with a clearness not to be mistaken that Mr. Serjeant Snubbin was far too much occupied with his professional pursuits to take any great heed or regard of his personal comforts."

Time, of course, will not permit further reference to that delicious trial. The bullying thunder of Serjeant Buzfuz and the inferior cunning of Mr. Skimpin stand to-day, as they did then, as an example of what may be legally made out of a piece of whole cloth.

A word might be said in passing of another type—the hanger-on of the insolvent court—Mr. Solomon Pell. See if you don't recognize him. He was "a fat, flabby, pale man, in a surtout which looked green one minute and brown the next; with a velvet collar of the same cameleon tints. His forehead was narrow, his face wide, his head large, and his nose all on one side, as if Nature, indignant with the propensities she observed in him in his birth, had given it an angry tweak from which it had never recovered. Being short-necked and asthmatic, however, he respired principally through this feature; so perhaps what it wanted in ornament it made up in usefulness."

"The late Lord Chancellor, gentlemen, was very fond of me," said Mr. Pell. . . . 'I remember, gentlemen, dining with him on one occasion;—there was only us two, but everything as splendid as if twenty people had been expected,—the great seal on a dumb-waiter at his side, and a man in a bag wig and a suit of armor guarding the wall with a drawn sword and silk stockings, which is perpetually done, gentlemen, night and day; when he said, 'Pell,' he said, 'No false delicacy, Pell. You are a man of talent; you can get anybody through the Insolvent Court, Pell; and your country should be proud of you.' Those were his very words. 'My Lord,' I said, 'You flatter me.' 'Pell,' he said, 'If I do, I'm damned.' . . . 'You will excuse me, gentlemen; I was imprudent. I feel I have no right to mention this matter without his concurrence. Thank you, sir, thank you.' Thus delivering himself, Mr. Pell thrust his hands into his pockets, and frowning grimly around, rattled three half-pence with terrible determination."

What wonder that the discriminating Mr. Weller, the elder, entrusted him with the probate of the estate of his lamented wife!

Comment on the picturesque features of the classic firm of Dodson & Fogg has been purposely deferred. The best light is thrown on Mr. Fogg by Mr. Wicks, one of his clerks, when he describes, in the hearing of Mr. Pickwick and Sam Weller how his superior treated a poor, unfortunate named Ramsey who had fallen into his toils:

" 'Well, sir, have you come to settle?' 'Yes, I have, sir,' said Ramsey, putting his hand in his pocket and bringing out the money, 'the debt's two pound ten, and the costs three pound five, and here it is, sir,' and he sighed like bricks as he lugged out the money, done up in a bit of blotting paper. Old Fogg looked first at the money and then at him, and then he coughed in his rum way so that I knew something was coming. 'You don't know there's a declaration filed, which increases the costs materially, I suppose?' said Fogg. 'You don't say that, sir,' said Ramsey, starting back; 'the time was only out last night, sir.' 'I do say it, though,' said Fogg. 'My clerk's just gone to file it. Hasn't Mr. Jackson gone to file that declaration in Bullman and Ramsey, Mr. Wicks?' Of course, I said yes, and then Fogg coughed again and looked at Ramsey. 'My God!' said Ramsey, 'and have I nearly driven myself mad, scraping this money together, and all to no purpose?' 'None at all,' said Fogg coolly; 'so you had better go back and scrape some more together and bring it here in time.' 'I can't get it, by God,' said Ramsey, striking the desk with his fist. 'Don't bully me, sir,' said Fogg, getting into a passion on purpose. 'I am not bullying you, sir,' said Ramsey. 'You are,' said Fogg. 'Get out, sir. Get out of this office, sir, and come back, sir, when you know how to behave yourself.' Well, Ramsey tried to speak, but Fogg wouldn't let him, so he put the money in his pocket and sneaked out. The door was scarcely shut, when old Fogg turned around to me, with a sweet smile on his face, and drew the declaration out of his coat pocket. 'Here, Wicks,' says Fogg, 'take a cab and go down to the Temple as quick as you can and file that. The costs are quite safe, for he's a steady man with a large family . . . and if he gives us a warrant of attorney as he must in the end, I know his employers will see it paid; so we may as well get all we can out of him, Mr. Wicks. It's a Christian act to do it, Mr. Wicks, for with his large family and small income, he'll be all the better for a good lesson against getting into debt. Won't he, Mr. Wicks, won't he?'—and he smiled so good-naturedly as he went away, that it was delightful to see him. 'He is a capital man of business,' said Wicks in a tone of the deepest admiration, 'capital, isn't he?'

" 'Nice men, these here, sir,' whispered Mr. Weller to his master. 'Werry nice notion of fun they has, sir.' "

This man of business, we learn, was "an elderly, pimply-faced, vegetable-diet sort of man, in a black coat, dark mixture trousers and small black gaiters; a kind of being who seemed to be an essential part of the desk at which he was writing, and to have about as much thought or feeling." Mr. Dodson was "a plump, portly, stern-looking man, with a loud voice." But enough has been said to entirely justify Mr. Pickwick's angry final words which he flung with intense gusto over the banisters after them when all the costs in the Bardell case were settled and paid: "You are a couple of mean, rascally, pettifogging robbers"—a description that applies just as appropriately to some of our brethren today, as to those worthies of an earlier time.

In "Oliver Twist," the next and really first novel of Dickens, there is a fine working in of legal atmosphere, notably in the trial of Fagin. But the emphasis is almost entirely on the dramatic effect, and nothing is said about the personnel of the lawyers. A picture of Magistrate Fang is shown, on the occasion of Mr. Brownlow's visit after his pocket had been picked, which is worthy of attention.

"Mr. Fang was a lean, long-backed, stiff-necked, middle-sized man, with no great quantity of hair, and what he had, growing on the back and sides of his head. His face was stern and much flushed. If he were really not in the habit of drinking rather more than was exactly good for him, he might have brought an action against his countenance for libel, and have recovered heavy damages."

He proceeds to bully-rag and brow-beat and insult Mr. Brownlow who had attempted in a gentlemanly manner to state his case. The policeman who had arrested Oliver states there were no witnesses.

"Mr. Fang sat silent for some minutes, and then turning round to the prosecutor, said in a towering passion:

" 'Do you mean to state what your complaint against this boy is, man, or do you not? You have been sworn. Now if you stand there refusing to give evidence, I'll punish you for disrespect to the bench; I will by ——.' "

"By what, or by whom, nobody knows, for the clerk and jailer coughed very loud just at the right moment; and the former dropped a heavy

book upon the floor, thus preventing the word from being heard—accidentally, of course.”

When Oliver drops in a faint on the floor and has been committed for three months’ hard labor, the owner of the bookstand rushes in and convinces the court with much difficulty that Oliver was not the criminal, having witnessed the entire transaction, Dickens remarks:

“Although the presiding genil in such an office as this, exercise a summary and arbitrary power over the liberties, the good name, the character, almost the lives, of her Majesty’s subjects, especially of the poorer class; and although within such walls, enough fantastic tricks are dally played to make the angels blind with weeping, they are closed to the public, save through the medium of the daily press.”

It appears that the book Mr. Brownlow had in his hand had not been paid for.

“‘A nice person to prefer a charge against a poor boy,” said Fang, with a comical effort to look humane. ‘I consider, sir, that you have obtained possession of that book under very suspicious and disreputable circumstances; and you may think yourself very fortunate that the owner of the property declines to prosecute. Let this be a lesson to you, my man, or the law will overtake you yet. The boy is discharged. Clear the office.’”

Everyone can sympathize with the “D——n me” of the old gentleman as he “bursts with the rage he had kept down so long.” Some of us have witnessed scenes not unlike this in the justice shops of our own unhallowed memory.

Passing over “Nicholas Nickelby,” the next book of Dickens’ earlier work, which, strange to say, contains no lawyer characters, we come to one, which while least artistic, perhaps, introduces us to as precious a pair of legal scoundrels as ever graced the pages of fiction—Mr. Sampson Brass and his sister Sally. Dickens seems to have gone far afield into his imagination to conjure up personages of such incarnate villainy and swept clean the by-ways of sentimentality, in giving us “Old Curiosity Shop.” As a novel, it is impossible. Yet in the unblushing tools of the devilish Quilp, and in the lovable and delightful Dick Swiveller, he has wrought material that will never die.

Sampson Brass stands forth, as if fashioned of the metal of his name, thus:

"This Brass was an attorney of no very good repute from Bevis Marks in the City of London; he was a tall, meagre man, with a nose like a wen, a protruding forehead, retreating eyes, and hair of deep red. He wore a long black surtout reaching nearly to his ankles, short black trousers, high shoes and cotton stockings of a bluish gray. He had a cringing manner, but a very harsh voice, and his blandest smiles were so extremely forbidding, that to have had his company under the least repulsive circumstances, one would have wished him to be out of temper that he might only scowl."

The den behind the name-plate of "Brass, Solicitor," is thus described:

"A rickety table with spare bundles of papers, yellow and ragged from long carriage in the pocket, ostentatiously displayed upon its top; a couple of stools set face to face on opposite sides of this crazy piece of furniture, a treacherous old chair by the fire-place, whose withered arms had hugged full many a client, and helped to squeeze him dry; a second-hand wig box, used as a depository for blank writs and declarations and other small forms of law, once the sole contents of the head which belonged to the wig which belonged to the box, as they were now of the box itself; two or three common books of practice; a jar of ink, a pounce box, a stunted hearth-broom, a carpet trodden to shreds but still clinging with the tightness of desperation to its tacks,—these, with the yellow wainscote of the walls, the smoke-discolored ceiling, the dust and cobwebs, were among the most prominent decorations of the office of Mr. Sampson Brass."

The lady lawyer was not a thing of Dickens' day, but Sampson had in his sister, "his clerk, assistant, house-keeper, secretary, confidential plotter, adviser, intriguer and bill of cost increaser, Miss Brass—a kind of Amazon at common law," who certainly merits attention among the lawyers of Charles Dickens.

"Miss Sally Brass, then, was a lady of thirty-five or thereabouts, of a gaunt and bony figure, and a resolute bearing, which if it repressed the softer emotions of love, and kept admirers at a distance, certainly inspired a feeling akin to awe in the hearts of those male strangers who had the happiness to approach her. In face she bore a striking resemblance to her brother Sampson—so exact, indeed, was the likeness between them, that had it consorted with Miss Brass's maiden modesty and gentle womanhood to have assumed her brother's clothes in a frolic and sat down beside him, it would have been difficult for the oldest friend of the family to determine which was Sampson and which Sally, especially as

the lady carried upon her upper lip certain reddish demonstrations, which, if the imagination had been assisted by her attire, might have been mistaken for a beard. These were, however, in all probability, nothing more than eye-lashes in a wrong place, as the eyes of Miss Brass were quite free from any such natural impertinencies. In complexion Miss Brass was sallow, so to speak—but this hue was agreeably relieved by the healthy glow which mantled in the extreme tip of her laughing nose. Her voice was exceedingly impressive—deep and rich in quality, and once heard, not easily forgotten. Her usual dress was a green gown, in color not unlike the curtain of the office window, made tight to the figure, and terminating at the throat, where it was fastened behind by a peculiarly large and massive button. Feeling, no doubt, that simplicity and plainness are the soul of elegance, Miss Brass wore no collar or kerchief except upon her head, which was invariably ornamented with a brown gauze scarf, like the wing of the fabled vampire, and which, twisted into any form that happened to suggest itself, formed an easy and graceful head-dress.

“Such was Miss Brass in person. In mind she was of a strong and vigorous turn, having from her earliest youth devoted herself with uncommon ardour to the study of the law; not wasting her speculations upon its eagle flights, which are rare, but tracing it attentively through all the slippery and eel-like crawlings in which it commonly pursues its way. Nor had she like many persons of great intellect, confined herself to theory, nor stopped short where practical usefulness begins; in as much as she could engross fair copy, fill up by printed forms with perfect accuracy, and in short transact any ordinary duty of the office down to pouncing a skin of parchment or mending a pen.”

When Brass and his rascally sister attempt to involve the innocent Kit in a petty theft, in obedience to the wishes of their wretched master, Quilp, the trial is in Mr. Dickens' best style. After Brass and his sister have been examined and cross-examined by respective counsel, “Mr. Brass's gentleman calls Richard Swiveller and Richard Swiveller appears accordingly.” This character, though he has been classed among the lawyers of Dickens, could hardly pass muster in that capacity on a strict analysis. He was a law clerk, and a mighty poor one at that; he was good for nothing and irresponsible to a degree; but he possessed in peculiar richness that human credibility, lightness, loveliness and absurdity, all tending to a very sympathetic assemblage of real essentials, that brings a joyous smile, even though it makes the heart bleed. Chesterton rightly says, he “is per-

haps the noblest of all the noble creations of Dickens." He does his best for poor Kit:

"Now, Mr. Brass's gentleman has it whispered in his ear that this witness is disposed to be friendly to the prisoner—which, to say the truth, he is rather glad to hear, as his strength is considered to lie in what is familiarly termed badgering. Whereupon he begins by requesting the officer to be quite sure that this witness kisses the book, and then goes to work at him tooth and nail.

"Mr. Swiveller," says this gentleman to Dick, when he has told his tale with evident reluctance and a desire to make the best of it, 'pray, sir, where did you dine yesterday—was it near here, sir?' 'Oh to be sure,—yes—just over the way.' 'To be sure, yes, just over the way,' repeats Mr. Brass's gentleman with a glance at the court. 'Alone, sir?' 'I beg your pardon,' says Mr. Swiveller, who has not caught the question. 'Alone, sir?' repeats Mr. Brass's gentleman in a voice of thunder, 'did you dine alone? Did you treat anybody, sir? Come!' 'Oh yes, to be sure—yes, I did,' says Mr. Swiveller with a smile. 'Have the goodness to banish a levity, sir, which is very ill-suited to the place in which you stand (though perhaps you have reason to be thankful that it's only that place),' says Mr. Brass's gentleman, with a nod of the head, insinuating that the dock is Mr. Swiveller's sphere of action; 'and attend to me. You were waiting about here yesterday, in expectation that this was coming on. You dined over the way. You treated somebody. Now, was that somebody brother to the prisoner at the bar?' Mr. Swiveller is proceeding to explain. 'Yes, or no, sir,' cries Mr. Brass's gentleman. 'But will you allow me——' 'Yes or no, sir.' 'Yes, it was, but——' 'Yes, it was,' cries the gentleman, taking him up short—and a very pretty witness *you* are.'

"Down sits Mr. Brass's gentleman. Kit's gentleman not knowing how the matter really stands, is afraid to pursue the subject. Richard Swiveller retires, abashed. Judge, jury and spectators have visions of his lounging about with an ill-looking, large-whiskered, dissolute young fellow of six feet high. The reality is, little Jacob, with the calves of his legs exposed to the open air and himself tied up in a shawl. Nobody knows the truth; everybody believes a falsehood; and all because of the ingenuity of Mr. Brass's gentleman."

We cannot further follow the fortunes of Sampson and his sister Sally. Dickens leaves them, five years after Sampson's sojourn in the penitentiary as "two wretched people" who "were more than once observed to crawl at dusk from the inmost recesses of St. Giles and to take their way along the streets, with shuffling steps and cowering, shivering forms, looking into the roads and kennels as they

went in search of refuse food or disregarded offal." But, then, Dickens, as I suspect, was trying to see how deep in horrors he could bring Quilp and all his associates, so as to form as acute a contrast as possible to the saintly precocity of little Nell and the exquisite loveliness of Dick Swiveller.

Passing "*Barnaby Rudge*," which has no men of law, we come to the author's first incursion into America, which was the cause of some considerable resentment—"Martin Chuzzlewit"—but which, as soon as its great satire was properly understood, lost him no friends. The book contains many notable characters that did much to enhance Dickens' permanent reputation; but it is certainly not among his best. Pecksniff and Mrs. Gamp will never die. The two Jonases are powerfully conceived. The only lawyer is a rather incidental and ordinary figure—Mr. Fips, of Austen Friars. He is the vehicle employed by old Jonas Chuzzlewit to provide Tom Pinch with employment pending the former's exposure of Pecksniff. There is nothing particularly striking to recall about Mr. Fips—and his "mighty yellow jaundiced little office," with its old rug designed apparently for tripping up clients. There was "a great black sprawling splash upon the floor in one corner, as if some old clerk had cut his throat there, years ago, and had let out ink instead of blood." There is really nothing more to say than to agree with Dickens that when all the clouds of mystery were cleared away, "he showed himself a perfect Trump, did Fips, in all respects."

Yet there is nothing salient to take hold of, so we go on, passing another lawyerless chronicle, "*Dombey and Son*," and reach that very excellent novel, most beloved by Dickens himself, "*David Copperfield*."

This book is the first of that obvious classification,—the later works of Dickens. From here on, one finds less caricature and more realism. Whether, Dickens' genius being what it was, this means improvement in his work, is a debatable question. So far, however, as his lawyers are con-

cerned, it cannot be denied that the more serious treatment accorded them from now on, shows that the author was not entirely bound to ridicule and despise his early abandoned profession. It is easy to see that for some reason Dickens had at last come around to the point of view that one could be a normal human being and a lawyer, too—and so he strives to paint them more and more as they really were, with only occasional lapses into the grotesque—although, as I have sought to imply, the latter treatment is the more effective as an instrument of reform.

The quasi-autobiographical nature of *David Copperfield* presented a fine field for the transition to the new manner. Again, Dickens passed from *Dombey and Son*, with which he at times had much difficulty, he confesses, in proceeding, to a work which he loved, and had long made notes for—vivid, convincing and real. The grotesque becomes here less and less apparent,—the real lawyers stand out as actual characters in the drama of life.

From the moment the face of Uriah Heap is described, one is conscious of the nature to whom it belongs:

"It was quite as cadaverous as it had looked in the window, though in the grain of it there was that tinge of red which is sometimes to be observed in the skins of red-haired people. It belonged to a red-haired person—a youth of fifteen, as I take it now, but looking much older—whose hair was cropped as close as the closest stubble; who had hardly any eyebrows, and no eyelashes, and eyes of a red-brown, so unsheltered and unshaded that I remember wondering how he went to sleep. He was high-shouldered and bony; dressed in decent black, with a white wisp of a neck-cloth, buttoned up to the throat; and had a long, lank skeleton hand, which particularly attracted my attention as he stood at the pony's head, rubbing his chin with it, and looking up at us in the chaise."

Next is described the mild, weak, gentlemanly steward of estates who subsequently became so tightly enmeshed in the toils of the "umble Uriah," and to whose care David was entrusted,—Mr. Wickfield:

"His hair was quite white now, though his eyebrows were still black. He had a very agreeable face, and, I thought, was handsome. There was a certain richness in his complexion which I had been long accustomed under Peggotty's tuition to connect with port wine; and I fancied

it was in his voice, too, and referred his growing corpulency to the same cause. He was very cleanly dressed, in a blue coat, striped waistcoat, and nankeen trousers, and his fine frilled shirt and cambric neck-cloth looked unusually soft and white, reminding my strolling fancy (I call to mind) of the plumage on the breast of a swan."

At last David is taken over to Doctors' Commons to see how he would like to become a proctor in admiralty. The court is described, with the sundry gentlemen in red gowns and gray wigs, whom David found to be the doctors, together with the proctors in black gowns with white fur, and the "little old gentleman whom if I had seen in an aviary I should certainly have taken him for an owl, but who, I learned, was the presiding judge."

"The public, represented by a boy with a comforter and a shabby-genteel man secretly eating crumbs out of his coat pockets, was warming itself at a stove in the center of the Court. The languid stillness of the place was only broken by the chirping of this fire and by the voice of one of the doctors, who was wandering slowly through a perfect library of evidence and stopping to put up, from time to time, at little roadside inns of argument on the journey. Altogether, I have never, on any occasion, made one at such a cosy, dozy, old-fashioned, time-forgotten, sleepy-headed little family party in all my life; and I felt it would be quite a soothing opiate to belong to it in any character—except, perhaps, as a suitor."

The conception of Spenlow and Jorkins—one of Dickens' happiest—must not be overlooked. It has its application even today. Spenlow

"was a little, light-haired gentleman, with undeniable boots, and the stiffest of white cravats and shirt-collars. He was buttoned up mighty trim and tight, and must have taken a great deal of pains with his whiskers, which accurately curled. . . . He was got up with such care, and was so stiff, that he could hardly bend himself, being obliged, when he glanced at some papers on his desk, after sitting down in his chair, to move his whole body, from the bottom of his spine like Punch."

Negotiations are opened to place David under the tuition of this firm. David suggests that he should, before pledging himself, have an opportunity of trying how he liked it, before he bound himself irrevocably.

"'Oh, surely! surely!' said Mr. Spenlow, 'we always in this house propose a month—an initiatory month. I should be happy, myself, to

propose two months—three—an indefinite period, in fact—but I have a partner, Mr. Jorkins.'

"'And the premium, sir,' I returned, 'is a thousand pounds.'

"'And the premium, Stamp included, is a thousand pounds,' said Mr. Spenlow. 'As I have mentioned to Miss Trotwood, I am actuated by no mercenary considerations; few men are less so, I believe; but Mr. Jorkins has his opinions on these subjects, and I am bound to respect Mr. Jorkins' opinions. Mr. Jorkins thinks a thousand pounds too little in short.'"

"I was quite dismayed by the idea of this terrible Jorkins. But I found out afterwards that he was a mild man of heavy temperament, whose place in the business was to keep himself in the background and be constantly exhibited as the most obdurate and ruthless of men. If a clerk wanted his salary raised, Mr. Jorkins wouldn't listen to such a proposition. If a client were slow to settle his bill of costs, Mr. Jorkins was resolved to have it paid, and however painful these things might be (and always were) to the feelings of Mr. Spenlow, Mr. Jorkins would have his bond. The heart and hand of the good angel Spenlow would have been always open, but for the restraining demon Jorkins. As I have grown older, I think I have had experience of some other houses doing business on the principle of Spenlow and Jorkins!"

David later had occasion to ask Mr. Spenlow what he considered the best sort of professional business. The answer, I am sure, appeals to us all—though not perhaps for the same reasons, exactly.

"A good case of a disputed will, when there was a neat little estate of thirty or forty thousand pounds, was, perhaps, the best of all. In such a case, he said, not only were there very pretty pickings in the way of arguments at every stage of the proceedings, and mountains upon mountains of evidence on interrogatory and counter-interrogatory (to say nothing of an appeal lying, first to the Delegates and then to the Lords); but the costs being pretty sure to come out of the estate at last, both sides went at in a lively and spirited manner, and expense was no consideration."

Spenlow carries his humbuggery to the grave. After he had impressed with much care on David that he had "some property to bequeath to his child," upon his sudden demise, it was discovered that he not only had no will, but precious little property. Jorkins, left alone, despite his reputation, soon discloses his utter incapacity, and the business goes to pieces.

And how shall we dispose of the firm of Wickfield and

Heap after the hypocritical office boy had grown to get his amiable employer into his relentless grasp?

"The reversal of the two natures," as David puts it, "in their relative positions, Uriah's of power and Mr. Wickfield's of dependence, was a sight more painful to me than I can express. If I had seen an ape taking command of a man, I should hardly have thought it a more degrading spectacle."

At last, however, with the aid of Wilkins Micawber and the excellent Mr. T. Traddles of the Inner Temple—Traddles, with his wide open eyes, and comic head of hair—Uriah is punished as he deserves, and the weak Mr. Wickfield has his honor and his manhood restored to him for the purpose of simmering out in a gentle old age. But it is a good book, after all, and one that lays hold of the heart strings, while it enriches the mind with its examples of unique human character, finely drawn.

It seems as if in "Bleak House" Dickens had tried his hand at the conventional novel of the day;—but it fairly bristles with the atmosphere of the law, the Court of Chancery holding the gloomy center of the stage. "This is the Court of Chancery," he wails in mournful cadence; "which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every mad-house, and its dead in every churchyard; which has its ruined suitor, with his slip-shod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, 'suffer any wrong that can be done you, rather than come here.' "

Well, that is one view of it—and a view which is persistently pushed throughout this well named tale. Naturally lawyers abound throughout. Conspicuous among these

is the old family solicitor, Mr. Tulkinghorn—"an old-fashioned old gentleman, attorney at law, and eke solicitor of the High Court of Chancery."

"He is of what is called the old school—a phrase generally meaning any school that seems never to have been young—and wears knee breeches tied with ribbons, and gaiters and stockings. One peculiarity of his black clothes and of his black stockings, be they silk or worsted, is, that they never shine. Mute, close, irresponsible to any glancing light, his dress is like himself. He never converses when not professionally consulted. He is found sometimes, speechless, but quite at home, at corners of dinner tables in great country houses and near doors of drawing rooms, concerning which the fashionable intelligence is eloquent; where everybody knows him, and where half the Peerage stops to say, 'How do you do, Mr. Tulkinghorn?' He receives these salutations with gravity, and burles them along with the rest of his knowledge."

His office, likewise, deserves description:

"Like as he is to look at, so is his apartment in the dusk of the present afternoon. Rusty, out of date, withdrawing from attention, able to afford it. Heavy, broad-backed, old-fashioned mahogany and horse-hair chairs, not easily lifted, obsolete tables with spindle-legs and dusty balse covers, presentation prints of the holders of great titles in the last generation, or the last but one, environ him. A thick and dingy Turkey-carpet muffles the floor where he sits, attended by two candles in old-fashioned silver candle-sticks that give a very insufficient light to his large room. The titles on the backs of his books have retired into the binding; everything that can have a lock has got one; no key is visible. Very few loose papers are about. He has some manuscript near him, but is not referring to it. . . . Mr. Tulkinghorn is not in a common way. He wants no clerks. He is a great reservoir of confidences, not to be so tapped. His clients want him; he is all in all."

And so, faithful, watchful, wise, he goes to his death in the interests of his clients like a good soldier—a picture of over-fidelity in the unearthing of a family skeleton. Mr. Tulkinghorn is fine. Consistently and cleverly drawn, he is the first serious lawyer character of Dickens, seriously treated.

There are many other lawyers in this lawyers' book. One cannot resist a glimpse at Mr. Kenge of Kenge and Carboy, Lincoln's Inn, for there are many very recognizable traits here.

"He appeared to enjoy beyond everything the sound of his own voice," says Esther Summerson. "I couldn't wonder at that, for it was mellow"

and full, and gave great importance to every word he uttered. He listened to himself with obvious satisfaction, and sometimes gently beat time to his own music with his head or rounded a sentence with his hand. I was very much impressed by him—even then, before I knew that he formed himself on the model of a great lord who was his client, and that he was generally called ‘conversation Kenge.’”

And what shall we say of that most respectable man, that essential cog in the system of chancery cunctation, Mr. Vholes? He is retained by young Richard Carstone, you remember, in the exuberant hope that he would thereby get something done in *Jarndyce vs. Jarndyce*. But Mr. Vholes is on to his job. He must have time to do things. He has a father and three daughters to support. He must have “refreshers.” As Dickens puts it, “Mr. Vholes with his three daughters and his father in the vale of Taunton, is continually doing duty, like a piece of timber, to shore up some decayed foundation that has become a pitfall and a nuisance. And with a great many people, in a great many instances, the question is never one of a change from Wrong to Right (which is quite an extreme consideration), but is always one of inquiry or advantage to that eminently respectable legion, Vholes.”

Esther describes him as “a sallow man with pinched lips that look as if they were cold, a red eruption here and there upon his face, tall and thin, about fifty years of age, high-shouldered and stooping. Dressed in black, black-gloved and buttoned to the chin, there was nothing so remarkable in him as a lifeless manner, and a slow fixed way, he had of looking at Richard.”

Can’t you see him expounding to Richard in his “buttoned-up half-audible voice”?—

“What are you to do, sir, you inquire, during the vacation. I should hope you gentlemen of the army may find many means of amusing yourselves, if you give your minds to it. If you had asked me what *I* was to do during the vacation, I could have answered you more readily. I am to attend to your interests. I am to be found here, day by day, attending to your interests. That is my duty, Mr. C.; and term time or vacation makes no difference to me. If you wish to consult me as to your interests, you will find me here at all times alike. Other professional

men go out of town. I don't. Not that I blame them for going; I merely say, I don't go. This desk is your rock, sir."

It would be well, if there were time, to make some mention of Mr. Guppy, the efficient young clerk of Kenge & Carboy. But it is evident we must dismiss him with the little touch we all so well understand that he reveals when he goes down to inspect the portraits in Chesney Wold:

"Us London lawyers don't often get an out; and when we do, we like to make the most of it, you know."

Perhaps this law-laden story cannot be better dismissed than by quoting Esther's short description of the Court of Chancery—so obviously accurate and true, that it has considerable historical value:

"When we came to the court, there was the Lord Chancellor . . . sitting in his great state and gravity, on the bench, with the mace and seals on a red table below him, and an immense flat nosegay, like a little garden, which scented the whole court. Below the table, again, was a long row of solicitors, with bundles of papers on the matting at their feet; and then there were the gentlemen of the bar in wigs and gowns—some awake and some asleep, and one talking and nobody paying much attention to what he said. The Lord Chancellor leaned back in his very easy chair, with his elbow on the cushioned arm, and his forehead resting on his hand; some of those who were present dozed; some read the newspapers; some walked about or whispered in groups; all seemed perfectly at their ease, by no means in a hurry, very unconcerned, and extremely comfortable."

"Hard Times" is lawyerless—a serious groping of the author in response to the serious call of humanity, and in that respect a distinct departure from anything he had previously done. It was followed by "Little Dorrit," which, to say the truth, is apt to bore the real lover of Dickens. It is a book with a purpose, but am I guilty of lese majesty when I say that the purpose is rather too heavily rubbed in? It contains an amusing and satirical sketch of a typical hanger-on at fashionable dinners, called Bar.

"The engaging young Barnacle was the first arrival; but Bar overtook him on the staircase. Bar, strengthened as usual with his double eye-glass and his little jury droop, was overjoyed to see the engaging young Barnacle; and opined that he was going to sit *in banco*, as we lawyers called it, to take a special argument.

"'Indeed,' said the sprightly young Barnacle, whose name was Ferdinand, 'how so?' 'Nay,' smiled Bar. 'If *you* don't know, how can *I* know? You are in the innermost sanctuary of the temple; *I* am one of the admiring concourse on the plain without.'"

"Bar could be light in hand, or heavy in hand according to the customer he had to deal with. With Ferdinand Barnacle he was gossamer. Bar was always modest and self-depreciatory—in his way. Bar was a man of great variety; but one leading thread ran through the woof of his patterns. Every man with whom he had to do was in his eyes a jurymen; and he must get that jurymen over if he could.

"'Our illustrious host and friend,' said Bar, 'our shining mercantile star;—going into politics?'

"'Going? He has been in Parliament some time you know,' returned the engaging young Barnacle.

"'True,' said Bar with his light comedy laugh for special jury men; which was a very different thing from his low comedy laugh for comic tradesmen on common juries; 'he has been in Parliament for some time. Yet hitherto our star has been a vacillating and wavering star? Humph?'

"An average witness would have been seduced by the 'Humph?' into an affirmative answer. But Ferdinand Barnacle looked knowingly at Bar as they strolled upstairs, and gave him no answer at all.

"'Just so, just so,' said Bar, nodding his head, for he was not to be put off in that way, 'and therefore I spoke of our sitting *in banco* to take a special argument—meaning this to be a high and solemn occasion, when, as Captain Macheath says, 'the judges are met; a terrible show!' We lawyers are sufficiently liberal, you see, to quote the Captain, though the Captain is severe upon us.'"

There are several passages of this kind, but we must leave the scenes of the frail, fatuous old "Father of the Marshalsea" and pass on to Dickens' concise and masterly essay in historical romanticism—the dignified and eloquent "Tale of Two Cities." The picture of the sublimely self-sacrificing, dissipated, ambitionless Carton, furnishing the brains and ingenuity for the strident, pushing and successful Stryver, is one whose appeal is never lost on the lawyers of any day and generation.

"Mr. Stryver, a man of little more than thirty, but looking twenty years older than he was, stout, loud, red, bluff, and free from any drawback of delicacy, had a pushing way of shouldering himself (morally and physically) into companies and conversations that argued well for his shouldering his way up in life."

Listen, then, to Sydney Carton, as he dines with the man whom his resourceful daring wit of applying a striking

physical similarity in himself to confuse a witness had saved from the clutches of the law.

"Do you feel, yet, but that you belong to this terrestrial scheme again, Mr. Darnay?"

"I am frightfully confused regarding time and place; but I am so far mended as to feel that."

"It must be an immense satisfaction!" He said it bitterly, and filled up his glass again, which was a large one.

"As to me, the greatest desire I have is to forget that I belong to it. It has no good in it for me—except wine like this—nor I for it. So we are not much alike in that particular. Indeed, I begin to think we are not much alike in any particular, you and I." . . .

"I think you have been drinking, Mr. Carton."

"Think? You know I have been drinking."

"Since I must say so, I know it."

"Then you shall likewise know why. I am a disappointed drudge, sir. I care for no man on earth, and no man on earth cares for me."

But as Dickens says, "Those were drinking days, and most men drank hard. So very great is the improvement Time has brought about in such habits, that a moderate statement of the quantity of wine and punch which one man would swallow in the course of a night, without any detriment to his reputation as a perfect gentleman, would seem, in these days, a ridiculous exaggeration." The following contrast between Stryver and Carton, and how the former progressed on the peculiar talents of the latter, is admirably drawn.

"It had once been noted at the bar that while Mr. Stryver was a glib man, and an unscrupulous, and a ready, and a bold, he had not that faculty of extracting the essence from a heap of statements, that is among the most striking and necessary of the advocate's accomplishments. But a remarkable improvement came upon him as to this. The more business he got, the greater his power seemed to grow of getting at its pith and marrow; and however late at night he sat carousing with Sydney Carton, he always had his points at his fingers' ends in the morning.

"Sydney Carton, idlest and most unpromising of men, was Stryver's great ally. What the two drank together between Hilary term and Michaelmas, might have floated a king's ship. Stryver never had a case in hand, anywhere, but Carton was there with his hands in his pockets, staring at the ceiling of the court; they went the same circuit, and even there they prolonged their usual orgies late into the night, and Carton was rumored to be seen at broad day, going home stealthily and unsteadily to his lodgings like a dissipated cat. At last, it began to get

about, among such as were interested in the matter, that although Sydney Carton would never be a lion, he was an amazingly good jackal, and that he rendered suit and service to Stryver in that humble capacity."

This is the way it was done:

"The lion then composed himself on his back on a sofa on one side of the drinking-table, while the jackal sat at his own paper-bestrewn table proper, on the other side of it, with the bottles and glasses ready to his hand. Both resorted to the drinking-table without stint, but each in a different way; the lion for the most part reclining with his hands in his waistband, looking at the fire, or occasionally flirting with some lighter document; the jackal, with knitted brows and intent face, so deep in his task, that his eyes did not even follow the hand he stretched out for his glass—which often groped about for a minute or more before it found the glass for his lips. Two or three times the matter in hand became so knotty that the jackal found it imperative on him to get up and steep his towels anew. From these pilgrimages to the jug and basin, he returned with such eccentricities of damp head-gear as no words can describe, which were made the more ludicrous by his anxious gravity.

"At length the jackal had got together a compact repast for the lion, and proceeded to offer it to him. The lion took it with care and caution, made his selections from it, and his remarks upon it, and the jackal assisted both. When the repast was fully discussed, the lion put his hands in his waistband again and lay down to meditate. The jackal then invigorated himself with a bumper for his throttle and a fresh application to his head, and applied himself to the collection of a second meal; this was administered to the lion in the same manner, and was not disposed of until the clocks struck three in the morning.

"'And now we have done, Sydney, fill a bumper of punch,' said Mr. Stryver.

"The jackal removed the towels from his head, which had been steaming again, shook himself, yawned, shivered, and complied.

"'You were very sound, Sydney, in the matter of those crown witnesses today. Every question told.'

"'I always am sound; am I not?'

"'I don't gainsay it. What has roughened your temper? Put some punch to it, and smooth it again.'"

But why follow the scene further? Why follow the wasted desert of forces to his neglected bed where he throws himself down, to dream of the golden haired doll in the court whom he had purposely disparaged to Stryver—on a "pillow wet with wasted tears."

"Sadly, sadly, the sun rose; it rose upon no sadder sight than the man of good abilities and good emotions, incapable of their directed exercise, incapable of his own help and his own happiness, sensible of the blight on him and resigning himself to let it eat him away."

There is no need for words of mine to carry the picture forward. Everyone knows the tale of love and sacrifice that Dickens so artfully and beautifully has told. How this ill-directed, drunken failure of a man gave up his love and gave up his useless life that another might fulfill his much more rational destiny. No wonder it was said about the city that night of his death, that his face "looked sublime and prophetic." What lawyer even in our own day who cannot feel and understand this bitter, bitter story of mis-directed emasculated ambition, in far greater measure than those who have never known the gnawing pursuit of one's self by one's self, when one has fallen by the wayside in the profession of the law! We know and best understand the unspoken thought of Carton with which the book closes, as he goes to lay his head beneath the cruel knife:

"It is a far, far better thing that I do; than I have ever done; it is a far, far better rest that I go to, than I have ever known."

We come now to what, in the judgment of this reviewer, is the finest and greatest book that Dickens ever wrote—"Great Expectations." Its art is more perfect, its humor more mature, its dramatic power more consistent, its balance and form, its morality, and its analysis of human character, more assured. Of special pertinence to this paper, it contains the best drawn lawyer character that Dickens ever attempted—Mr. Jaggers. To us with whom the practice of criminal law has degenerated and descended for the most part into the hands of a few jury-bribing jack-anapes and smart Alecks, this man of power and force and domination is superb and refreshing. It is no ideal picture that the author draws—but a big, bullying, able, forceful man, at once the idol and the terror of the unfortunate classes upon whose crimes and misdemeanors he builded his fame.

The indecisive Pip, scarce more than a child, encounters this strange guardian of his, on the stairs of Miss Havisham's house.

"He was a burly man of an exceedingly dark complexion with an exceedingly large head and a corresponding large hand. He took my chin in his large hand and turned up my face to have a look at me by the light of the candle. He was prematurely bald on the top of his head, and had bushy black eye-brows that wouldn't lie down, but stood up bristling. His eyes were set very deep in his head, and were disagreeably sharp and suspicious. He had a large watch-chain, and strong black dots where his beard and whiskers would have been if he had let them."

Now let us have a glimpse of Mr. Jagger's workshop:

"Mr. Jaggers' room was lighted by a skylight only, and was a most dismal place; the skylight, eccentrically patched like a broken head, and the distorted adjoining houses looking as if they had twisted themselves to peep down at me through it. There were not so many papers about as I should have expected to see; and there were some odd objects about that I should not have expected to see—such as an old rusty pistol, a sword in a scabbard, several strange looking boxes and packages, and two dreadful casts on a shelf, of faces peculiarly swollen, and twitchy about the nose. Mr. Jaggers' own high-backed chair was of deadly black horse-hair, with rows of brass nails around it like a coffin; and I fancied I could see how he leaned back in it, and bit his forefinger at the clients. The room was but small, and the clients seemed to have had a habit of backing up against the wall; the wall, especially opposite to Mr. Jaggers' chair, being greasy with shoulders."

Now for Mr. Jaggers in action:

"First he took the two secret men.

"'Now I have nothing to say to you,' said Mr. Jaggers, throwing his finger at them. 'I want to know no more than I know. As to the result, it's a toss-up. Have you paid Wemmick?'

"'We made the money up this morning, sir,' said one of the men submissively, while the other perused Mr. Jaggers' face.

"'I don't ask you when you made it up, or where, or whether you made it up at all. Has Wemmick got it?'

"'Yes, sir,' said both men together.

"'Very well, then you may go. Now, I won't have it!' said Mr. Jaggers, waving his hand at them to put them behind him. 'If you say a word to me, I'll throw up the case.'

"'We thought, Mr. Jaggers——' one of the men began, pulling off his hat.

"'That's what I told you not to do,' said Mr. Jaggers. 'You thought! I think for you; that's enough for you. If I want you, I know where to find you. I don't want you to find me. Now, I won't have it. I won't hear a word.'"

"The two men looked at one another as Mr. Jaggers waved them behind again, and humbly fell back and were heard no more."

So he passes through his list, bullying here, domineering there, and spreading abject terror. Then he comes to Mike:

"'Oh!' said Mr. Jaggers, to the men . . . 'Your man comes on this afternoon. Well?'"

"'Well, Mas'r Jaggers,' returned Mike, in the voice of a sufferer from a constitutional cold; 'arter a deal o' trouble, I've found one, sir, as might do.'"

"'What is he prepared to swear?'"

"'Well, Mas'r Jaggers,' said Mike, wiping his nose on his fur cap this time; 'in a general way, anythink.'"

"Mr. Jaggers suddenly became most irate. 'Now, I warned you before,' said he, throwing his forefinger at the terrified client, 'that if ever you presumed to talk in that way here, I'd make an example of you. You infernal scoundrel, how dare you tell me that?' . . ."

"Mike looked hard at my guardian as if he were trying to learn a lesson from his face, and slowly replied, 'Ayther to character, or to having been in his company and never left him all the night in question.'"

"'Now, be careful. In what station in life is this man?'"

"Mike looked at his cap, and looked at the floor, and looked at the ceiling, and looked at the clerk, and even looked at me, before beginning to reply in a nervous manner, 'We've dressed him up like'—when my guardian blustered out:

"'What? You *will*, will you?' . . ."

"'He is dressed like a 'spectable pleman. A sort of a pastry cook.'"

"'Is he here?' asked my guardian.

"'I left him,' said Mike, 'a setting on some doorsteps round the corner.'"

"'Take him past that window and let me see him.'"

"The window indicated, was the outer office window. We all three went to it, behind the wire blind, and presently saw the client go by in an accidental manner, with a murderous-looking tall individual, in a short suit of white linen, and a paper cap. This guileless confectioner was not by any means sober, and had a black eye in the green stage of recovery, which was painted over.

"'Tell him to take his witness away directly,' said my guardian to the clerk, in extreme disgust, 'and ask him what he means by bringing such a fellow as that.'"

It is a pity one cannot follow this really superb piece of character drawing further. He is worthy of appreciative study. On the whole, we cordially agree with Wemmick, after he and Pip had dined with Mr. Jaggers:

"'Well,' said Wemmick, 'that's over! He's a wonderful man, without his living likeness; but I feel that I have to screw myself up when I dine with him—and I dine more comfortably unscrewed.'"

"I felt that was a good statement of the case, and told him so."

The clerk Wemmick is really delicious, too. This man, who is the devoted slave and whipper-in for his imperious master, becomes when he goes home and leaves the office behind, a most filial and delightful and humane character. He lives in an extraordinary house, fortified like a castle, with drawbridge and moat, and evening gun for the delight of his harmlessly childish and deaf old father.

"Is it your own, Mr. Wemmick?"

"Oh, yes," said Wemmick. "I have got hold of it a bit at a time. It's a free-hold, by George!"

"Is it, indeed? I hope Mr. Jaggers admires it."

"Never seen it," said Wemmick. "Never heard of it. Never seen the Aged. Never heard of him. No; the office is one thing, and private life is another. When I go into the office, I leave the castle behind me, and when I come into the castle, I leave the office behind me."

With this bit of philosophy, time compels us to leave the excellent Wemmick—although one would like to dwell for a moment on his delightfully casual wedding. After a little luncheon, Wemmick picks up a fishing rod:

"Why we are not going fishing," said I. "No," replied Wemmick, "but I like to walk with one." I thought this odd; however, I said nothing, and we set off. We went towards Cambewell Green and when we were thereabouts, Wemmick said, suddenly:

"Halloa! Heres' a church!"

"There was nothing very surprising in that; but again I was rather surprised, when he said, as if he were animated by a brilliant idea:

"Let's go in!"

A couple of pairs of gloves were strangely found in his pocket, and then, to cap the climax, "Halloa!" said Wemmick. "Here's Miss Skiffins. Let's have a wedding." And so a wedding was had, and like all Wemmick's good deeds, was to be carefully kept from Mr. Jaggers. "He might think my brain was softening, or something of the kind."

The last complete book of Dickens, "Our Mutual Friend," is a strange mixture of his new manner and his old vein—and is on the whole rather unsatisfactory. Compared with the great artistry of its predecessor, it is confused and unconvincing. Its mystery refuses to mystify. For our purposes it contains two hitherto untouched types of legal gen-

tllemen—the rather purposeless and decidedly indolent young men about town, Mortimer Lightwood and Eugene Wrayburn. They represent the society side of the law—but their worthlessness is not really as deep-seated as their own polite patter would indicate. Their manner of speech doubtless reflects the affectation of their class and of their day.

“‘Let me see,’ said Mortimer as they went along; ‘I have been upon the honorable roll of solicitors of the High Court of Chancery, and attorneys at common law, five years; and—except gratuitously taking instructions, on an average once a fortnight, for the will of Lady Tiffins who has nothing to leave—I have had no scrap of business but this romantic business.’

“‘And I,’ said Eugene, ‘have been “called” seven years, and have had no business at all; and never shall have any. And if I had, I shouldn’t know how to do it.’

“‘I am far from being clear as to the last particular,’ returned Mortimer, with great composure, ‘that I have much advantage over you.’

“‘I hate,’ said Eugene, putting his legs on the opposite seat, ‘I hate my profession.’

“‘Shall I incommode you if I put up mine too?’ returned Mortimer. ‘Thank you, I hate mine.’

“‘It was forced upon me,’ said Mortimer, ‘because it was understood that we wanted a solicitor in the family. And we have got a precious one.’ . . .

“‘Then idiots talk,’ said Eugene, leaning back, folding his arms, smoking with his eyes shut, and speaking slightly through his nose, “of Energy.” If there is a word in the dictionary under any letter from A. to Z. that I abominate, it is energy. It is such a conventional superstition, such parrot gabble! What the deuce! Am I to rush out into the street, collar the first man of a wealthy appearance that I meet, shake him and say, “Go to law upon the spot, you dog, and retain me, or I’ll be the death of you?” Yet that would be energy.’

“‘Precisely my view of the case, Eugene. But show me a good opportunity, show me something really worth being energetic about, and I’ll show you energy.’

“‘And so will I,’ said Eugene.

“And it is likely enough that ten thousand other young men, within the limits of the London Postoffice town delivery, made the same hopeful remark in the course of the same evening.”

We all know, though, how they both became involved in the mystery of John Harmon’s disappearance. We all know how they both showed they had real stuff in them, in

spite of foppish disclaimer,—in spite of Eugene's purposeless pursuit of Lizzie Hexam, and brutal badgering of the half-insane Bradley Headstone. The whirl of events showed them both true men, and brought to them in time, it is hoped, though the story does not disclose it, the fruits of energy appropriately directed, even in the business of the law.

It was said at the start that the range of legal characters conceived by Dickens was very wide. We have seen the trim, trig, and ordinary in Mr. Perker; the contingent fee sharpers in Dodson and Fogg; the bullying pettifogging in Serj. Buzfuz; the commonplace, hard-working, cunning barrister in Serj. Snubbin; the sloppy, down-in-the-heel bankruptcy braggert in Solomon Pell; the reprobate magistrate in Fang; incarnate villainy in Sampson Brass; the faithless humble hypocrite in Uriah Heap; the weak, ineffective and unfortunate man of promise in Wickfield; the ingenious humbug in Spenlow, and his incompetent partner, Jorkins; the faithful, assiduous old-fashioned family solicitor, in Mr. Tulkinghorn; the self-satisfied legal narcissus in Kenge; the eminently respectable expert chancery cunctator in Vholes; the sublime sacrifice of the brilliant jackal in Carton; the strident, successful and shouldering barrister, in Stryver; the great, forceful, bullying master of criminal law in Jaggers; and the social legal dilettante, in Lightwood and in Wrayburn. What is there left? Notice, too, that each is a distinct type, complete and disassociated in its setting.

Only the other day I read of some modern Buzfuz fulminating against what he called the "cheap caricatures" of Dickens as libels on our noble profession. The fact of the matter is that any lawyer who takes himself too seriously to appreciate Dickens' art—true shafts of humor when directed at as vulnerable a point as so many of our brethren present, deserves a specially reserved spot in the lower regions. He certainly has no place amid the great majority.

Dickens' weapon was ridicule—after all the most ef-

fective disturber of social weaknesses. It was what made Moliere one of the world's greatest writers. The comparison of Dickens with the great Frenchman is suggestive. As Moliere made mad to their own destruction those very few social sinners whom he did not overwhelm with delight, so Dickens holds up to wholesome ridicule the objects of his keen observation among a profession that is certainly open to attack, but whose back is usually broad enough to laugh with the rest of the world, as it attempts to sit a little bit straighter in response to the artist's wit. No lawyer, it seems to me, can really afford to take offense at Dickens' art, or Dickens' method.

Call his creations caricatures, or call them rich, red, human characters; we know them all; we ought to understand them all. It has not been possible to touch upon every man of the law or characteristic scene, that Dickens has woven into his treatment of legal subjects. If, in this very fragmentary way, I may have stirred some of you to wander back into half-forgotten fields of fragrant memory, I have accomplished my object.

It is appropriate on the approach of the great man's centennial, that we should express anew in some such way, if in no other, our gratitude for the gift of his genius to the world.

GEORGE PACKARD.

CHICAGO, ILLINOIS.

EXTRA-TERRITORIAL EFFECT OF DECREE FOR DIVORCE ON CONSTRUCTIVE SERVICE.

The sole purpose of this paper is to discuss the validity of a decree of divorce rendered by a foreign court, in so far as the validity is dependent upon the jurisdiction which the court acquires over the defendant, when such jurisdiction was acquired in the manner provided by the law of the sovereignty under which a divorce was granted. In other words, when a court of competent jurisdiction in which a suit for divorce is instituted, acquires jurisdiction over the defendant in the manner prescribed by the local law, has it acquired such jurisdiction over the defendant as entitles its decree of divorce to extra-territorial recognition, assuming that the court has jurisdiction of the subject-matter of the divorce, that it has jurisdiction to grant a divorce at the suit of the plaintiff, that the divorce is granted on a ground entitling it to be recognized extra-territorially, and that the proceedings are regular.

As to some phases of this question there can be no serious difference of opinion. Thus, it is not questioned that a foreign divorce is valid if both of the parties were domiciled within the territorial jurisdiction of the court, whether the service or process upon the defendant was actual or constructive. Nor is it questioned that a foreign divorce is valid if it was granted against a nonresident defendant who was personally served with process within the territorial jurisdiction of the court or who entered an appearance in the suit. There is no doubt either that a foreign divorce is invalid if neither of the parties was domiciled within the jurisdiction of the court, and the decree was based upon constructive service only. But the question as to the extra-territorial effect of a divorce granted in favor of a plaintiff domiciled within the court's jurisdiction and against a nonresident defend-

ant has given rise to such a decided difference of opinion that the authorities are in hopeless and irreconcilable conflict, as will be shown.

The cases in the state courts, with a few exceptions hereinafter noted, overwhelmingly preponderate in holding that wherever plaintiff has acquired a *bona fide* domicile in a particular state he may lawfully appeal to the courts of that state for a dissolution of the marriage tie, for the causes permitted by its statute, and may call in the nonresident defendant by publication.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon the principles of comity, which gave to the court a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the state where it is rendered is obligatory in every other state.

New York: It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within that state, which shall be operative in that state even although the defendant is a nonresident and is proceeded against by constructive service. *Borden v. Fitch*,¹ and *Bradshaw v. Heath*,² were decided respectively in the years 1818 and 1835. These cases as declared by the Court of Appeals of New York in *People v. Baker*,³ upheld the principle that a court of another state could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other state or voluntarily appeared in the cause. The doctrine that an action of divorce is one *inter partes* was thus clearly reiterated by Andrews, J., in *Jones v. Jones*.⁴ "The contract of marriage can not be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The

¹ 15 Johns, 121.

² 13 Wend. 407

³ 76 N. Y. 82.

⁴ 108 N. Y. 415, 424; 15 N. E. Rep. 707.

marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by a substituted service or actual notice of the proceedings given without the jurisdiction of the court where the proceedings is pending." That the principle is still in force by the New York court is shown by recent cases, viz.,⁵ and it is indubitable that under this doctrine the courts of New York have invariably refused as they have done in the former cases, to treat a divorce granted in another state under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and indeed have they refused generally to give effect to such decrees even by state comity:

Massachusetts: *Barber v. Root*,⁶ *Hanover v. Turner*,⁷ *Hartu v. Hartu*,⁸ was decided respectively in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that state, following a section forbidding the recognition of divorce obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: A divorce decreed in another state or country according to the laws of the place by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state. And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statute, was accompanied by the following comment: "This is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." In *Lyon v. Lyon* (1854),⁹ the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to

⁵ *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. Rep. 979; *Winston v. Winston*, 165 N. Y. 553, 59 N. E. Rep. 273.

⁶ 10 Mass. 260.

⁷ 14 Mass. 227.

⁸ 14 Pick. 181.

⁹ 2 Gray (Mass.), 367.

a marriage against the other who was domiciled in Massachusetts. The court refused to give extra-territorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw, it was declared that the three cases which I have previously referred to sustains the doctrine, based upon general principles of law, that a decree of divorce rendered in another state without jurisdiction of both of the parties possesses no extra-territorial force. In *Hood v. Hood* (1865),¹⁰ the controversy was this: The parties were married in Massachusetts and after a residence in that state moved together to Illinois. The wife left the domicile of the husband in Illinois and returned to Massachusetts. Thereafter in Illinois, the husband sued the wife for divorce on the ground of her desertion, obtained a decree and married again. The case decided in Massachusetts was a suit brought in that state by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extra-territorial effect in Massachusetts depended upon the rule announced in the previous cases, upon whether both the husband and the wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicile was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicile of the husband was the domicile of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the

¹⁰ 11 Allen, 196.

Illinois court. Applying this legal principle to the facts in the case before it the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicile of the husband was the domicile of the wife prevailed, and that the Illinois decree was entitled to extra-territorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties. In *Shaw v. Shaw* (1867),¹¹ the facts were these: The parties were married in Massachusetts, lived there, and left together for the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by extreme cruelty of the husband to leave him. She returned to Massachusetts while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court in the most explicit terms recognized that a decree of divorce to have extra-territorial effect must be rendered with jurisdiction over both parties. It said: "For the purpose of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicile of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and one of them lived in that state when the cause of divorce occurred. It was held that at the time of the commission of the cruelty in Philadelphia charged against the husband, the domicile of the parties in Massachusetts had not been lost and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicile by the husband in Colorado did not make such domicile that of the wife, there was justification and the divorce was granted.

¹¹ 98 Mass. 158.

Hood v. Hood (1872),¹² was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, because it was found that both husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be *res judicata* as to all persons and to foreclose further inquiry into the validity of the Illinois decree of divorce. In Burlen v. Shannon (1874),¹³ the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massachusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it sufficeth to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained.¹⁴ Shannon went to Indiana in 1855 and took up his domicile in that state, where in 1856 he obtained a decree of divorce upon constructive service. Subsequently in Massachusetts Mrs. Burlen again sued Shannon for necessities furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extra-territorial effect in Massachusetts. The court in effect after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another state was sought to be given effect in Massachusetts; also reiterating the previous ruling that the wife might acquire a separate domicile from the husband if she lived separate from him for justifiable cause. The court was brought therefor, to consider whether, Mr.

¹² 110 Mass. 463.

¹³ 115 Mass. 438.

¹⁴ 3 Gray, 387.

and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicile of the husband was the domicile of the wife. The solution of this question depended, as it had depended in *Hood v. Hood*,¹⁵ upon whether the wife was absent from her husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, therefore, under the legal presumption that the domicile of the husband was the domicile of the wife, both, the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgments in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the state where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit if not the letter of the state statute without the slightest intimation to that effect.

In *Cumington v. Belchertown*,¹⁶ the facts were these: The parties to a marriage celebrated in Massachusetts, lived together in that state until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicile in New York, there brought suit on the ground of fraud for the annulment of the marriage and obtained a decree. The wife was only constructively served with process, did not appear and was not represented. The Massachusetts court held upon the authority of the *Blackington* case,¹⁷ that if a decree was to be recognized in Massachusetts it could only be on

¹⁵ 11 Allen, 196.

¹⁶ 149 Mass. 223, 21 N. E. Rep. 435.

¹⁷ 141 Mass. 432, 5 N. E. Rep. 830.

grounds of comity. And in concluding its opinion the court said: "Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens and thus effect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court and deprive her of the right acquired by her marriage and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it can not be avoided; we are of the opinion that it should not be enforced here and that no principle of interstate comity requires that we should give it effect." True, it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in one class, it is of necessity also essential in the other.

Maine: In *Harding v. Alden* (1832),¹⁸ the facts were these: While living together in Maine, a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband during the coverture, owned and alienated real estate in Maine, and a statute of that state provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court

in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the State of Maine. Considering the opinion in its entirety it is plain that the Rhode Island divorce was given recognition from consideration of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both states and that divorces were granted in Maine against nonresidents, and it was observed that "there would be great inconvenience in holding that divorces ought not to be recognized in other states when granted in the state where the *injured party* resided against one who had established his domicile in another state and there committed adultery.

True, it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense, and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was by the decree of the Maine court expressly limited to the dissolution of the marriage. How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will be made clear by what follows: *Harding v. Alden* was decided at the July term, 1832. Less than two years afterwards, on March 5, 1834, Public Laws, 1834, c. 116, p. 119, the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: "Section 2. Be it further enacted, that in all cases where one party has been or shall be divorced from the bonds of matrimony the court granting the same upon application therefor grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the revised statute, 1840, c. 89, sec. 2, and, although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not

intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits.¹⁹ In the case cited, although a husband had already obtained an absolute divorce a like divorce was granted to the wife and the court allowed to her certain articles of personal property and the sum of \$500. In overruling exceptions to the decree the appellate court adopted a theory that the second decree in no wise impugned the first and was important only as enabling "the court to make such ancillary decrees concerning the property as justice and humanity may require. In the course of the opinion the court said:

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth as *ex parte* divorce suits. The notice is often imperfect so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses testifying in the presence of one of the parties and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present each is sure to put the other in the wrong; and *a fortiori* is this true, when one of the parties is permitted to testify in the absence of the other as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise the grossest injustice is liable to be done."

In the light of this decision it can not be assumed that the courts of Maine would give to a citizen of that state against whom a divorce had been obtained in a foreign jurisdiction upon a constructive service—a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

Rhode Island: *Ditson v. Ditson* (1856),²⁰ was a suit for divorce on the grounds of desertion, extreme cruelty and nonsupport, brought by a wife domiciled in Rhode Island, against the husband who had never resided in Rhode Island,

¹⁹ *Stilphen v. Stilphen*, 58 Me. 508.

²⁰ 4 R. I. 87.

and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of *Lyon v. Lyon*,²¹ in which case, as previously shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the *Ditson* case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extra-territorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding *in rem*, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other state.

New Jersey: Whilst the courts of New Jersey have exercised the power to grant a divorce from a nonresident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other states, when sought to be enforced in New Jersey against citizens of that state, a rule like the one prevailing in New York, that is, they declined to enforce them even upon the principles of comity.

Recently, however, it has been decided,²² that where a decree of divorce was rendered in another state, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been per-

²¹ 2 Gray, 367; *Doughty v. Doughty*, 28 N. J. Eq. 586; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. Rep. 669.

²² *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. Rep. 105, 49 Atl. Rep. 107.

sonally served outside of the jurisdiction with notice of the pendency of the divorce proceeding and was afforded reasonable opportunity to make defense and did not avail of the opportunity, effect would be given to such decree in New Jersey upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey recognized as sufficient cause for divorce. In *Wallace vs. Wallace*,²³ the subject is quite fully reviewed.

Ohio: In *Cooper v. Cooper* (1836),²⁴ without citation of authority a divorce granted in Indiana from a resident in Ohio upon constructive service, was held to bar an application for divorce and alimony in Ohio. In *Mansfield v. McIntire* (1840),²⁵ despite a divorce obtained in Kentucky by a husband upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower. In *Cox v. Cox*,²⁶ decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana and there obtained a divorce upon constructive service. The wife remained in Ohio and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such appeal, under the statute of Ohio did not affect the decree as to the divorce, the district court considered only the question of alimony and rendered a new decree for alimony against the defendant. The case was then taken to the Supreme Court of the state. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over nonresidents in divorce cases, and reference was made to various authorities tending to show that public policy required the recognition of the validity of such decrees in other states

²³ 62 N. J. Eq. 509, 50 Atl. Rep. 788.

²⁴ 7 Ohio (pt. 11), 238.

²⁵ 10 Ohio, 27.

²⁶ 19 Ohio St. 502.

as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled to under the laws of Ohio to either divorce or alimony or both, at her election, and alluding to the Indiana decree, the court said:

"The question therefore is whether the *ex parte* decree can be made available not merely to effect a dissolution of the marriage but to defeat the right of the petitioner to the alimony which the statute upon the facts as they exist in regard to the husband's desertion, intended to provide for her. We think the decree ought not to have such effect. In arriving at this conclusion we make no distinction between a decree rendered under the circumstances in this case in a foreign, and one rendered in a domestic forum. In either case, to give a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which *ex parte* decrees of divorce are authorized and supported. It is not essential to the allowance of alimony that the marriage relation should exist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

In *Doerr v. Forsythe* (1893),²⁷ an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in land in Ohio owned during coverture by the husband.

Alabama: In *Thompson v. State*,²⁸ the facts were these: Thompson deserted his family in Mississippi, went to Arkansas and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and after the divorce the husband also went to Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set aside, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a *bona fide* domicile in Arkansas during the pendency

²⁷ 50 Ohio St. 726; 35 N. E. Rep. 1055. ²⁸ 28 Ala. 12.

of the proceeding for divorce. *Harding v. Alden*,²⁹ was cited as authority.

Indiana: In *Tolen v. Tolen* (1831),³⁰ the facts were these: A wife on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the nonresident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be *valid in Indiana*, and decided it had such power, but expressly reserved passing on the question whether the decree would have extra-territorial force. In *Hood v. States* (1877),³¹ it was declared that an *ex parte* divorce in favor of one domiciled in the jurisdiction of the state, and against the nonresident, although founded upon constructive service, was valid as to plaintiff "public policy" demands that it should be held valid as to both parties.

Missouri: In *Gould v. Crow*,³² a decree of divorce regularly obtained by a husband in Indiana on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. *Harding v. Alden*,³³ was relied upon for authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other states, and whether obtained on personal service or by order of publication. The doctrine of *Gould v. Crow* was reaffirmed and applied in *Anthony v. Rice*.³⁴

Wisconsin: In *Shafer v. Bushnell* (1869),³⁵ an *ex parte* divorce granted the wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the ground of comity to be conclusive in Wisconsin with respect to the status or domestic and social condition

²⁹ 9 M. E. 140.

³⁰ Black (Ind.), 407.

³¹ 56 Ind. 363, 271.

³² 57 Mo. 200.

³³ 9 M. E. 140.

³⁴ 110 Mo. 223, 19 S. W. Rep. 423.

³⁵ 24 Wis. 372.

of the wife. In *Cook v. Cook* (1882),³⁶ however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan, upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin nor to bar her from suing in Wisconsin for divorce, alimony, allowance, and a division of the property of such husband situated in Wisconsin.

Kentucky: The rule in Kentucky is settled in *Rhym's v. Rhym's*,³⁷ in which a wife proceeded against her husband as a nonresident by a warning order, and it was held that the court had jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could by leaving the state deprive his abandoned wife of the power to obtain a divorce at home." In *Hawkins v. Ragsdale*,³⁸ it was held that a divorce obtained by the husband in Indiana by constructive service determined the status of the party in Kentucky, and that under the statutes of that state it barred all claims to curtesy or dower in Kentucky lands. To the same effect is *Perzel v. Perzel*.³⁹

California: The law of California is settled in *Re Newman*,⁴⁰ to the effect that a suit for divorce, as far as it affects the status of the parties and the custody of their children, is a proceeding *in rem*, and service by publication on a nonresident defendant is good. This ruling was repeated in *Re James*,⁴¹ where it is declared that such decree is equally valid in other states.

Tennessee: Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in *Thomas v. King*,⁴² and where it seems to have been held that the decree could not be impeached even by showing the absence of necessary residence.

³⁶ 56 Wis. 195, 14 N. W. Rep. 443.

³⁷ 7 Bush (Ky.), 316.

³⁸ 80 Ky. 353.

³⁹ 91 Ky. 634, 15 S. W. Rep. 658.

⁴⁰ 75 Cal. 213, 16 Pac. Rep. 887.

⁴¹ 99 Cal. 374, 33 Pac. Rep. 1122.

⁴² 95 Tenn. 60, 31 S. W. Rep. 983.

Kansas: The law in Kansas is settled in *Rodgers v. Rodgers*,⁴³ to the effect the courts of the sister states may dissolve a marriage relation between a husband domiciled there and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of the children residing there. But it was also decided in *Chapman v. Chapman*,⁴⁴ that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower to lands in Kansas, fraudulently conveyed by her husband, in fraud of her or others.

Louisiana: In *Smith v. Smith*,⁴⁵ it is held that a wife may acquire a separate domicile from that of her husband where his conduct has been such as to furnish ground for divorce, and her marriage status becomes subject to the jurisdiction of that domicile, and that the courts thereof may grant a divorce upon actual or constructive notice. The right of the Louisiana courts to decree a divorce against the absentee by means of substituted service is again affirmed in *Butler v. Washington*.⁴⁶

Iowa: In *Kline v. Kline*,⁴⁷ a decree rendered in another state on service by publication was recognized, except so far as it attempted to fix the custody of the minor children.

Maryland: In *Garner v. Garner*,⁴⁸ the power to grant a divorce against a nonresident, upon whom process has not been served, was recognized, but the right to a decree that the nonresident should not marry again was denied.

Minnesota: In *Thurston v. Thurston*,⁴⁹ the divorce was recognized, though process was served outside of the state. But it was held that the question of alimony was not *res adjudicata* by reason of the judgment. The wife was allowed alimony out of the property in Minnesota.

Illinois: The validity of a foreign divorce obtained with-

⁴³ 56 Kan. 483, 43 Pac. Rep. 779.

⁴⁴ 48 Kan. 636, 29 Pac. Rep. 1071.

⁴⁵ 43 La. Ann. 1140, 10 So. Rep. 248.

⁴⁶ 45 La. Ann. 279, 12 So. Rep. 356.

⁴⁷ 57 Iowa, 386, 10 N. W. Rep. 825.

⁴⁸ 56 Md. 127.

⁴⁹ 58 Minn. 279, 59 N. W. Rep. 1017.

out personal service is recognized in Illinois in *Knowlton v. Knowlton*,⁵⁰ and in *Dunham v. Dunham*.⁵¹

The law in this country, then, may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained, in another state, by a party there domiciled, in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved.

But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such right to dower in lands of which the husband was seized during coverture, and inferentially, at least, to alimony from such property. It is also limited to property within the state, where suit is brought. That her right in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only states in which it is held that a party domiciled in another state may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

The confusion of our divorce laws is forcibly illustrated in the case of *Haddock v. Haddock*,⁵² decided by the Federal Supreme Court in April, 1906. The Haddocks were married in 1868, in New York, where both parties then resided. The very day of the ceremony and before the marriage was consummated, they separated and never lived together. The wife continued to reside at her former home; the husband, after some years of wandering, established a domicile in Connecticut, and, in 1881, obtained in a Connecticut court a decree of absolute divorce from his wife. In this suit constructive service on the wife was obtained

⁵⁰ 155 Ill. 158, 39 N. E. Rep. 595.

⁵¹ 162 Ill. 589, 44 N. E. Rep. 841.

⁵² 210 U. S., p. 562.

in accordance with the local statute. In 1891, Mr. Haddock inherited a considerable quantity of property, and three years afterwards, twenty-six years after the marriage and thirteen years after the Connecticut divorce, the woman brought suit against him in New York for a divorce from bed and board and for alimony. The defendant was served constructively, and a decree for fifteen hundred dollars annual alimony was rendered. As there was no personal service the decree, so far as alimony was concerned, was, of course, ineffectual. But in 1899 the woman obtained personal service on Haddock in a new proceeding and a valid decree for alimony in the sum of seven hundred and eighty dollars a year was entered. In the meantime Haddock, acting on the Connecticut divorce, had married again, and the effect of the New York decree was to declare his second wife an adulteress and to bastardize any issue of the second marriage. Haddock appealed to the United States Supreme Court, on the grounds that the decrees denied full faith and credit to the Connecticut divorce. The Supreme Court upheld the action of the New York court and affirmed its judgment. This decision was reached by a bare majority of the nine judges, Mr. Justice White writing the opinion of the court for himself, the Chief Justice and Justices Peckham, McKenna and Day, Brown and Holmes, JJ., filed dissenting opinions in which Harlan and Brewer, JJ., concurred. The point involved, broadly stated, is the extra-territorial validity of a decree of divorce pronounced after constructive service on the defendant. This extra-territoriality depends upon assimilating divorce decrees to judgments *in rem*, and judgments *in rem* are ordinarily said to include all judgments other than those *in personam*. The courts which view divorce judgments *in rem* find the *res* in the marriage status of the parties, and make the jurisdiction over this status depend on the *bona fide* domicile of one party. The will to adopt this view, if a paraphrase of Professor James' expression is permitted, comes from a consideration of the intolerable consequences

of any other construction—husbands without wives, wives without husbands, sexual relations legitimate or illegitimate according as they take place on one side or the other of imaginary geographical lines, persons, bastard or legitimate according as they are within or without a particular jurisdiction. Those courts which deny extra-territorial validity to divorce decrees and assimilate them to judgments *in personam*, see a sufficient motive for their course in a growing tendency toward laxness in the marriage tie, and increasing frequency of divorce, and a consequent weakening of the very foundation of society. In support of each view the right of the state to determine the status of its own citizen is appealed to; one side declaring that the principle renders necessary giving jurisdiction to the state wherein the plaintiff has a *bona fide* domicile without regard to the defendant's residence; the other arguing that to concede jurisdiction in such cases absolutely deprives the defendant's state of jurisdiction over the status of its own citizen. The Federal Supreme Court had not committed itself to either of these views until the decision in 1901 of *Atherton v. Atherton*.⁵³ This case presented the validity of a divorce obtained in Kentucky by a husband who was residing there against the wife domiciled in New York. Kentucky was the matrimonial domicile and the husband bringing suit there, obtained a decree of absolute divorce upon constructive service on the wife in accordance with the laws of Kentucky. Upon a subsequent suit by the wife in New York for a limited divorce and alimony the United States Supreme Court, reversing the Court of Appeals of New York, held the Kentucky decree binding and within the full faith and credit clause of the Federal Constitution. The Federal court was careful to limit its decision to the actual facts presented—the possession of jurisdiction by the state of the matrimonial domicile and to disclaim prejudging the status of the decree of a state where one of the parties only ever had a domicile. But no disclaimer could do away

⁵³ 181 U. S. 155.

with the fact that a divorce decree was treated as belonging to the class of judgments *in rem*, in that a judgment rendered against a person domiciled elsewhere upon constructive service only was held to satisfy the requirement of due process of law, and to be within the full faith and credit clause of the United States Constitution. *Atherton v. Atherton* is surely as much open as the Connecticut decision in *Haddock v. Haddock* to the charge of depriving the defendant's own state of the right to determine the defendant's matrimonial status. And, after all, granting the truth of this charge, it seems nothing to freeze the blood or make each particular hair to stand on end. A race of diligence between two parties to give jurisdiction to one court or another is an idea familiar enough.⁵⁴

In *Pennoyer v. Neff*,⁵⁵ the court, speaking in a masterly opinion by Judge Field, declared that, since the Fourteenth Amendment had given to the Federal Supreme Court authority to determine the presence of due process of law in all cases, even in domestic judgments, a judgment void when brought in question beyond the limits of the state for want of due process was void also within a state for the same reason. *Haddock v. Haddock*, if this doctrine is to stand, means that the Connecticut decree is void even in Connecticut and the wife declared an adulteress everywhere. Or, if we discard this doctrine, we are brought back to the idea of decrees of divorce valid within a limited territory, invalid elsewhere. M, for instance, has been divorced on constructive service in New York from N, who resides in Pennsylvania, and has contracted a new marriage with O, in New York. In New York O is his wife, but once across the state line and he becomes the husband of N. In New York O's children are legitimate, but they become bastards as soon as they go out of that state, and in Pennsylvania M may still have children by N who are legitimate everywhere except in New York, but who are bastards there. The

⁵⁴ Law Notes, vol. 10, No. 3.

⁵⁵ 95 U. S. 714.

wildest nightmare never produced conditions more chaotic than all this. Is it possible that there is some third alternative? May we imagine a decree that operates upon and binds the plaintiff, as due process of law, while invalid as to the defendant? In *Atherton v. Atherton*, Mr. Justice Gray pronounced the idea of a husband without a wife or a wife without a husband to be "unthinkable." But under the opinion in *Haddock v. Haddock*, we may have to entertain ideas beyond the range of Mr. Justice Gray's capacity. The *Atherton* case is recognized as authoritative in *Haddock's* case, and we are therefore in the position of treating divorce decrees as in effect *judgments in rem*, when the circumstances fall exactly within the facts of *Atherton's* case, whereas under other circumstances we ought to treat them as in *per personam*. By settled decisions of the court a wife may, under certain circumstances, acquire a real *bona fide* domicile in the state where her husband has never been, but it appears that many of her dearest personal rights still adhere in the matrimonial domicile, a palpable fiction is admitted so as to give validity to the decree of divorce of the matrimonial domicile, while the actual domicile, which she has been forced to adopt through her husband's misconduct, is not recognized. And while the fiction of the wife's presence is operative at the matrimonial domicile, it is without effect, in favor of a domicile which the husband may afterward acquire, else the *Haddock Connecticut* divorce would have been valid. When husband and wife each acquire a separate domicile different from the matrimonial domicile, then there is no possibility of a divorce without personal service—or perhaps the jurisdiction may still cling round the fragments of the shattered matrimonial domicile. We have been told on the highest authority within a few years that the law was not a logical science, and should not be deterred by considerations of logic from stopping short of a given conclusion. One may feel with Mr. Justice Brown that *Haddock v. Haddock* "seems to be a step backward in American jurisprudence,"

and yet assent to Judge Holmes' somewhat cynical remark: "I do not suppose that civilization will come to an end whichever way this case is decided." Civilization will not come to an end, nor, we may predict, will the decisions of the United States Supreme Court on this interesting and important topic, until some consistent and comprehensible principles are laid down for its government. An interesting attempt to reconcile these cases is made in the September, 1907, number of Bench and Bar, by Mr. Raymond D. Thurber of the New York bar. Mr. Thurber's article is of considerable length and closely reasoned. I give, however, a passage which suggests the method of reconciling the Atherton case with the Haddock case: "If the jurisdiction of the Kentucky court depended on the actual fact of Mrs. Atherton's domicile in Kentucky, to reconcile the two decisions would be a logical impossibility. But that is not the case. On the contrary, the rule is that when a court has some evidence of the existence of a jurisdictional fact, its finding that the fact exists will confer jurisdiction to render a decree which will be exempt from collateral attack. Such evidence, it is believed, as to the defendant's domicile in Kentucky is to be found in those circumstances in the Atherton case which were held to establish the jurisdiction. The parties were living there as husband and wife; and up to the time of the separation the marital status—the entire *res*—was beyond question safely housed within the state. The wife as well as the husband were both actually and constructively domiciled there; and, under a familiar rule, this status is presumed to have continued until proven to have been altered. Again, the defendant, being the wife, was subject to the presumption that her domicile was that of her husband—a presumption which could be overcome only by showing not only that she had left him, but that she had a right to leave him. Hence, by merely proving this situation, the plaintiff made out a *prima facie* case for full jurisdiction; and this would seem to put the decree beyond the reach of collateral attack." The Kentucky court "having

before it a sufficient *prima facie* case of jurisdiction, it was not bound to make any preliminary inquiry, but could safely proceed without regard to a possibility that a more thorough examination, upon evidence not before it, might require it to dismiss the case. All of which tends to establish the soundness of the proposition which we started out to examine, viz., that the state of the matrimonial domicile, if the plaintiff has deserted there and still resides there, has *prima facie* jurisdiction over the marital status of the errant defendant—at least if the defendant be the wife. This, is believed by Mr. Thurber as the only logical explanation of the consistency of the Atherton and Haddock cases.

Viewing the attempt of the learned Mr. Thurber to reconcile the celebrated cases of Atherton v. Atherton and Haddock v. Haddock along with the decisions of the United States Supreme Court and the dissenting opinions of Justices Brown and Holmes, which were concurred in by Justices Harlan and Brewer, in the latter case, it would require a faculty for judicial analysis to reconcile the discussions on this important topic, that could

Sever and divide,
A hair twixt the north,
And northeast side.

MALVERN, ARK.

HENRY BERGER.

CURRENT TOPICS AND NOTES.

OUR CONTRIBUTORS.—EVERETT V. ABBOT, joint author with Mr. Boston of "The Judiciary and the Administration of the Law," was born in Pennsylvania; educated at the Cambridge public schools, Harvard University (A. B. 1886, A. M. 1899), Harvard Law School (LL. B. 1889). He is at present a member of the law firm of Keith & Abbot, New York City. He is a member of the American Bar Association, the Association of the Bar of the City of New York, the New York State Bar Association and the New York County Lawyers' Association.

CHARLES A. BOSTON was born in Maryland and educated at the Baltimore City College and Johns Hopkins University. LL. B. University of Maryland, 1886. He is the author of the articles on Medical Laws and Privileged Communications, and associate author of the article on The Law of Insanity in Witthaus & Becker's "Medical Jurisprudence." He is a member of the American Bar Association (member of Local Council for New York); the New York State Bar Association (chairman of committee on Land Title Registration); the Association of the Bar of the City of New York; the New York Law Institute; the New York County Lawyers' Association (member of its board of directors and chairman of its committee on professional ethics); president of the Alumni Association of New York and New Jersey, of the Johns Hopkins University, and president of the board of trustees of the Society of Medical Jurisprudence of New York.

EDWARD LINDSEY has been a frequent contributor to the REVIEW, his last article being upon "Wilson versus The Wilson Doctrine."¹

GEORGE PACKARD, the writer of "The Lawyers of Charles Dickens," is a native of Rhode Island; he graduated from Brown University in 1889, and from Northwestern University Law School in 1891, and was admitted to the Chicago bar in the same year. He first entered the law office of Peckham & Brown, but was appointed assistant attorney of the World's Columbian Exposition in 1892, and returned to the Peckham & Brown firm in 1893. Since then he has engaged in general practice. In 1897, the firm became Peckham, Brown & Packard; in 1903, Peck-

¹ 44 Am. Law Rev., 641, 750.

ham, Smith, Packard & Apmadoc; later, Peckham, Brown, Packard & Walsh. Upon the re-election of Judge Brown to the bench, the firm was merged with Peck, Miller & Starr under the name of Miller, Starr, Packard & Peckham.

HENRY BERGER is a native of the City of St. Louis, but has been a member of the Arkansas bar for thirteen years. He is now city attorney of Malvern, in that State.

JOHN F. DILLON.—The supply of biographical material regarding the writers of ephemeral novels is always abundant, but the public knows less of the authors of monumental legal and medical treatises. While readers are informed that Miss Flossie Flint composes her poems best between midnight and 2 a. m., but little is heard of the busy judge or overworked physician who snatches a few hours from his regular duties to complete the laborious task of giving to his profession a work that will outlive his own generation.

Away back in the 60's, John F. Dillon, then a judge of the supreme court of Iowa, had the ambition to write a treatise upon some subject which he hoped might be useful to his profession. He had only attained his judicial position after years of struggle. Born in Montgomery County, New York, in 1831, he went to Iowa a boy, worked his way through college and finally graduated from the medical school of the University of Iowa, in 1850. But after six months' practice, he discovered that medicine had no attraction for him, and with a decision that indicated his temperament, he commenced to study law. Two years later he was admitted to the bar, and after a few years' practice, he was called to the bench. The subject which Judge Dillon decided for his legal treatise was "Municipal Corporations," a topic that necessitated a vast amount of work. "Whoso desireth to discourse in a proper manner concerning corporated towns and communities, must take in a great variety of matter and should be allowed a great deal of time and preparation. The subject is extensive and difficult." Thus said that learned and laborious legal antiquary, Thomas Madox, in 1726, in the preface to his "*Firma Burgi*," or an "Historical Essay Concerning the Cities, Towns, and Boroughs of England, taken from Records,"—a folio of 348 pages, whose value survives unto the present. This statement being true of municipalities in England in his day, is much more applicable to American municipalities in our own time. Judge Dillon was then living in Davenport, Iowa, and fortunately there existed in the library of Judge Grant of the same city, one of the best private collections of law books in the country. "Without the aid of stenographer or typewriter, and with no previous American treatise

tise to guide me, I began an examination, one by one, of some thousands of the law reports, commencing with Vol. I of the State of Maine and continuing through successive reports in that state to date," said Judge Dillon. "In like manner the reports of every one of the states and of the Federal and English courts was examined, occupying all my available time for about six years. The result of this research I have never had occasion to regret. The result was a single volume work that was so well received that a second, revised edition was demanded the following year, 1873." It appears that there is a difference between an edition of a law book and an edition of a novel. The former implies a revision while a new edition of a "best seller" is simply a reprinting without change of text.

Judge Dillon was subsequently made a United States Circuit Judge for the eighth judicial district, which extended from Minnesota to Arkansas and from Wisconsin to Colorado. In 1879 he resigned and went to Columbia University as professor of real estate and equity jurisprudence. Three years later he took up private practice, and is now general counsel for the Missouri Pacific Railway, the Western Union Telegraph Company and the Texas Pacific Railway Company. He has since written several other important treatises, such as "Removal of Causes from State to Federal Courts," "Municipal Bonds," "Laws and Jurisprudence of England and America," and a life of Chief Justice Marshall, but it is his *Municipal Corporations* that will stand as his legal masterpiece.

Now at seventy-nine, Judge Dillon has prepared a new edition in five octavo volumes of this great authority, after having devoted most of his spare time for the past few years in its revision. It was in 1890 that the fourth edition appeared in two volumes, but by reason of the numerous and important constitutional provisions in the states, and legislation applicable to municipalities, made necessary by their growth and by the multitudinous decisions in the forty-six states of the Union, and in the Federal courts construing and applying these constitutional requirements and legislation since 1890, the development of the law on the various subjects has rendered it absolutely necessary to recast and enlarge the framework and scope of this treatise in order to exhibit comprehensively and fully the American Law of Municipalities as it exists in the year 1911. This alert and vigorous counsellor of seventy-nine, with his lucrative practice, has taken pride doing his own revising and expanding, instead of farming the work out, as many another younger and less prosperous, eminent lawyer would have done. To quote a few statistics, Judge Dillon has increased the number of words from 778,986 to 2,034,878, the number of cases cited from 153 pages to 494 and the index from 178 pages to 300. These five stout octavo volumes now contain Judge Dillon's final labor on his monumental work.

"Over forty-five years have elapsed since the preparation of Municipal Corporations began, and more than thirty-eight years since its first publication," says Judge Dillon. "It is therefore not only a child, but the companion of the greater part of a prolonged professional career. Any justifiable satisfaction I might feel in its success is somewhat subdued, if not saddened, by the sombre, although not melancholy reflection that in this edition I am taking final leave of a work which is intimately incorporate with the studies, lucubrations, and labors of so many years. If these observations and reflections betray an author's vanity, they may perhaps on that account even be pardoned. I have indulged in these retrospections, not to gratify my feelings, but because they give opportunity to add that my chief pride and satisfaction in the work consists in the fact that it constitutes the largest and certainly the last payment that I shall be able to make on the Baconian debt which I acknowledge myself owing to this great profession of the law, to which without distraction, diversion, intermission, or other ambitions I have given fifty-nine years—the whole of my active life.

"The work falls far below my ideal and far short of what I could perhaps have made it, had I not been engrossed during all this time with the exacting duties of a lawyer, teacher, and judge. Yet these obstacles have their compensations, for no doctrinaire, no mere closet student of the law can be thoroughly prepared to write a practical and technical treatise on the Law of Municipal Corporations as it exists at this time and in this country. The author of a comprehensive treatise on the law ought to be a person who has the experience and training which are possible only to the practicing lawyer and the judge. And these qualifications on the bench and in daily practice I have had in full measure, and I feel that to this environment the work is indebted for a large share of whatever practical value and usefulness it may possess.

"Diligent and anxious care has been given to make this revision of the last edition thorough and complete. Every section and every sentence has been gone over personally by me, with the result that the work has been enlarged as above stated and with the further result that in nearly every section and part of the present edition will be found additions and changes bringing the work down as fully as possible to date."

Judge Dillon has dedicated his work to the American Bar Association, of which he is a former president, in these words:

"To mark my sense of the value and usefulness of your organization as the accredited representative of the bar of the United States, as well as my appreciation of the high honor of having been one of your presidents, this work, national in its scope and character, is inscribed by the author to the association by its gracious permission with every sentiment of respect and gratitude."

THE STANDARD OIL CASE.—The decision of the Supreme Court of the United States in the Standard Oil case has attracted great attention, as it had been awaited by the public with great hope that it would affirm the power of the nation to curb the acts of the great monopoly. That it should do so by a unanimous voice was hardly looked for, so accustomed have the people become to a divided tribunal on great constitutional questions. The anti-trust law has been upheld, the acts and policies of the company are declared to "destroy the potentiality of competition," and show an "intent and purpose to maintain the dominancy of the oil industry, . . . with the purpose of excluding others from the trade and thus centralizing in the combination perpetual control." The court rejects the plea of the company that, since complete control of sources of supply was not exercised by the company, no attempt at monopoly could have existed. Monopoly of the channels of distribution, acquired as it had been acquired by the Standard Oil, inferred substantial power of control in all branches of the industry. The decree of dissolution made by the court of appeals is accordingly reaffirmed, though with further time for reconstruction of the business.

But in its announcement that whether or not any contract or combination is within the purview of the prohibition created by the statute must depend upon its reasonableness, the court is not unanimous, but finds a vigorous dissenter in the person of its oldest member, Mr. Justice Harlan. Chief Justice White's view is summed up in these words:

"In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intent of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the

ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute."

To this, Mr. Justice Harlan replies that such a view of the meaning and intent of the statute is in conflict with two previous decisions of the Supreme Court,¹ and more serious than this, it is an attempt of the judiciary to amend the law by judicial construction. The law says every contract and combination in restraint of trade shall be illegal and it is no part of either the right or the duty of the court to amend the statute by adding the word "reasonable." Mr. Justice Harlan concludes:

"After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the states without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated at law, is not to be desired. The supreme law of the land—which is binding alike upon all—upon presidents, congresses, the courts and the people—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure.² We shall do well to heed the warnings of that great jurist. I do not stop to discuss the merits of the policy embodied in the Anti-Trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the government which alone can make laws."

This part of the court's decision has not been received with universal satisfaction, and it is certainly open to the criticism that it leaves the matter in much doubt and uncertainty as to what combinations future judges may hold to be reasonable and legal and what combinations unreasonable and illegal. We refer our readers to three previous articles in the REVIEW on this subject,

¹ United States v. Freight Association, 166 U. S. 290; United States v. Joint Traffic Association, 171 U. S. 505.

² Boyd v. United States, 116 U. S. 616, 635.

one by Mr. Herbert Noble of the New York bar on the Standard Oil case,³ one by Mr. Frederic J. Stimson of the Boston bar on The Law of Combined Action and Possession,⁴ and one by Mr. M. S. Hottenstein of the Pennsylvania bar on the Sherman Anti-Trust Law⁵—all of them supporting the view of the majority of the court. In our next issue we hope to print an article on the other side of the controversy.

THE FEDERAL CORPORATION TAX DECISION.—The Federal tax authorized by Congress to be levied and collected upon corporations doing business in the United States under state or United States incorporation acts, which is a part of the Payne-Aldrich tariff act of 1909, has been declared constitutional by the Supreme Court of the United States.⁶ The constitutionality of the tax was contested on the ground that it was a direct tax, not apportioned and uniform throughout the country as the constitution requires, but laid upon corporations wherever they might be found, the amount to be collected to be one per cent on the entire net income over and above \$5,000 received from all sources. It was answered that the privilege of doing business as a corporation is taxed, and not the mere doing of business. The argument that, by taxing a state-chartered corporation, the national government unconstitutionally invades the prerogative of the state which granted the charter, is dismissed by the court on the ground that, in the nature of things, Federal excise taxes "must be collected from the same activities as are also reached by the states in order to support their local governments; and that if this were not true, citizens could invalidate the taxing power of the nation simply by continuing their business under a state franchise."

The government's case was argued by the new United States Solicitor-General, Hon. Frederick W. Lehmann, and is the first professional victory in his office of that distinguished lawyer and advocate.

CONTRACTS UNDER THE FEDERAL CONSTITUTION AND RAILROAD REGULATION.—Two important decisions have been made during the past term of the Federal Supreme Court on this subject. In a case from Iowa it is held that the liberty of contract guaranteed by the constitution is not infringed by a statute which amends the statutory law defining the liability of railroads for negligence in their operation, so that a railroad when sued on such liability, is precluded from making the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department. And that an unconstitutional discrimination is not made by amending the state statute, which defined

³ 44 Am. Law Rev. 1, 177.

⁴ 45 Am. Law Rev. 1.

⁵ 44 Am. Law Rev. 827.

⁶ Flint v. Stone Tracy Co.

the liability of railroads for injuries resulting from negligence or mismanagement in the use and operation of their roads, so that a railroad, when sued on such liability, may not raise the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department, although this provision of the amendatory act applies only to those employees who were embraced within the provisions of the original statute, and to the enforcement of the particular liabilities which that statute defined, and the benefits of such statute were confined to those engaged in the hazardous business of operating railroads.⁶

In the other case from the Court of Appeals of Kentucky it is held that Congress, in the exercise of its power over commerce, could enact the provisions of the act of June 26, 1906, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.⁷

The court said that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the constitution, and that Congress may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.

"These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist."

NEWSPAPERS AND THE FREE PASS.—The newspapers of the country are the last to succumb to the anti-pass legislation of Congress, and they have done so only after a stubborn fight. They contended that as they gave puffs and advertising to railroads the kind of passes they received were not really free, but for a consideration, and that the law did not cover them. But the Supreme Court of the United States holds that as other people have, under the Federal law, to pay for their transportation on railroads in money, editors and publishers must do likewise, Mr. Justice Harlan saying:⁸

⁶ *Chicago &c R. Co. v McGuire*, Oct. Term, 1910, decided Feb. 20, 1911.

⁷ *Louisville &c R. Co. v. Mottley*, Oct. Term, 1910, decided Feb. 20, 1911.

"The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money, which has a certain value, known to all, and not in commodities or services, or otherwise than in money."

THE OKLAHOMA BANK GUARANTY LAW.—The Supreme Court of the United States has affirmed the constitutionality of the bank guaranty law of Oklahoma. It lays down the broad principle that the police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe, and that contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositor's guaranty fund to secure the full repayment of deposits in case it or any other bank existing under the state laws becomes insolvent, unless such statute deprives the bank of liberty or property without due process of law. The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law.⁹

THE SAN FRANCISCO EARTHQUAKE AND LOST RECORDS.—The Supreme Court of the United States decides that a state possesses the power to remedy the confusion and uncertainty as to registered titles to land, arising from the loss or destruction of public records by flood, fire, or earthquake.

It holds that the safeguards afforded unknown claimants or claims by the provisions of the California statute of 1906, for the establishment and quieting of title to real property in case of the loss or destruction of public records, by an action *in rem*, to be brought by a person in the actual and peaceable possession of the property against "all persons claiming any interest in or lien upon the real property herein described, or any part thereof," satisfy the due process of law clause of the Federal Constitution, where such statute, as construed by the state courts, requires the plaintiff to designate and serve all known claimants, and those whom, with reasonable diligence, he can ascertain to be such, and calls for constructive service by publication against non-residents

⁹ Chicago & R. Co. v. U. S., Oct. Term, 1910, decided Feb. 20, 1911.

⁹ Noble State Bk. v. Haskell, Oct. Term, 1910, decided Jan. 3, 1911.

and unknown owners, for the conspicuous posting upon the property of a copy of the summons, and the recording of a *lis pendens*,—especially since under California law, any person interested and having no actual notice of the decree may come in at any time within a year after its rendition, and, upon showing cause, may have the decree vacated as to him, and be allowed to answer to the merits.¹⁰

THE PANAMA LIBEL CASES—THE FEDERAL COURTS WITHOUT JURISDICTION.—The Federal government, it will be remembered, endeavored to bring suit in the Federal courts against a New York newspaper for a criminal libel. The libels were contained in six issues of the *World*, a newspaper printed in the City of New York, of which newspaper the defendant, a New York corporation, was publisher. The first seven counts dealt with the publication of the libels by circulating copies of the newspaper containing the same within the reservation and military post in Orange county, New York, known as West Point. The remaining counts dealt with the publication of each of the libels by the delivery of a copy of the issue of the *World* containing the same to a postoffice inspector at his office in the Postoffice building in the City of New York. Both West Point and the Postoffice building were averred to be places within the exclusive jurisdiction of the United States. Those who were alleged in each count to have been criminally libeled were, at the time of the publications, the President of the United States, the secretary of war, and certain private individuals. The alleged libelous articles related to the purchase by the United States of the Panama canal. An indictment was presented by a grand jury in the U. S. Circuit Court for the Southern District of New York, but the trial court dismissed the case for want of jurisdiction. The government appealed, but the Supreme Court has sustained the order of the lower court. It is held that the circulation in the government reservation at West Point and in the Postoffice building in New York City, of copies of a newspaper containing a criminal libel printed and primarily published in such city, cannot be punished in the Federal courts under the act of July 7, 1898,¹¹ providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the state in which such places are situated, since the state laws afford adequate punishment for the offense, without resorting to the Federal courts, and their plain purpose is that there shall be but a single prosecution and conviction for a criminal libel.¹²

¹⁰ *American Land Co. v. Zeiss*, Oct. Term, 1910, decided Jan. 3, 1911.

¹¹ 30 Stat. at L. 717, chap. 576.

¹² *U. S. v. Press Pub. Co.*, Oct. Term, 1910, decided Jan. 3, 1911.

TWO STATESMEN ON LAW REFORM.—Two notable addresses on Reform in Legal Procedure have been recently made, one by President Taft at the meeting of the Conference on Reform of Criminal Law and Procedure, held at New York City in May, and the other by Senator Elihu Root at the annual meeting of the New York State Bar Association at Syracuse.

PRESIDENT TAFT ON CRIMINAL PROCEDURE.—President Taft in his address called attention to the large number of crimes which go unpunished in this country as contrasted with the effective enforcement of the criminal law in England. The difference he believes to exist through the character, experience and learning of the judges, in the power which they maintain and exercise in the course of the trial for the saving of time and the simplification of the issue and in the respect and obedience given to their intimations from the bench as to the proper behavior of counsel in the conduct of the case. He criticises severely the modern statutes which take away almost all of his historic powers from the trial judge and points out that under the proposed judicial recall, it was desired in some parts of the country to still further reduce the independence of the judiciary. Said the President.

"The statistics which show the crimes that go unpunished in this country as compared with those in England are startling and humiliating to any son of America who has pride in his fellow-countrymen as a law-abiding and law-enforcing people. A study of the English system will show that their procedure and their guaranties in favor of the individual as to indictment, trial and conviction, and that their provision for the security of the liberty of the individual are exactly the same as ours; for we derive ours from them. Our bills of rights, both in Federal and State Constitutions, are simple copies of limitations found in the magna charta, the petition of right, and the bill of rights, which are part of the British Constitution. Why is it then that, speaking generally, every person who commits a crime in England is tried and rarely escapes punishment, while in this country it is not too much to say that a majority escape the law? Certainly, if the statistics of the whole country are taken and the crimes considered are those of violence, the proportion of those who are never tried or who being tried, escape punishment, is a good deal more than fifty per cent of those committing such crimes. What are the changes that have taken place in the transplanting of the English system to this country that have weakened its effectiveness and that now call loudly for reform? We can not find the explanation, of course, in Jeremy Bentham's impeachment of criminal law procedure, because what he said was said of the English system. His comparison of the trial of a murderer to a game or a fox-hunt, in which the criminal was given a certain start and had the benefit of a number of rules to prevent his conviction that really interfered with proof of his guilt to the satisfaction of every common-sense mind, would apply as well to the English system as our own.

"Wherein is the great difference then between the effectiveness of the two systems? I believe it to exist in the character, experience and learning of the judges, in the power which they maintain and exercise in the course of the trial for the saving of time and the simplification of the issues, and in the respect and obedience given to their intimations from

the bench as to the proper behavior of counsel in the conduct of the case. If there is any other reason for the difference it can not be found in procedure. It must be found in the lighter regard for law and its enforcement on the part of our people as a whole and a consequent less rigorous public opinion in favor of the punishment of crime, which relieves prosecuting officers and grand juries from the highest standard in this regard, and which finds its way into, and exerts its influence in the jury panel during the trial and in the jury room during the consideration of the verdict. I am not disposed to minimize this last cause, and I am inclined to think that it is very influential and that it is shown to be such by a similar difference in the effectiveness of machinery for the prosecution of crime in the older states and in the newer and far western states. But, this reason aside, there is no other ground that I know of that will explain the difference between the admirable working of the English machinery for the prosecution of crime and that in this country except what I have called attention to in the character and power of the judge and in the method and conduct of counsel for the defendant.

"The trial by jury secured by the magna charta in England and required by the bills of right of our constitutions was a trial by a court and jury, or rather by a court which was made up of a judge and jury in which the functions of the judge were quite as important and ought to be as sacredly preserved as the functions of the jury. The tenure of the judge was during good behavior, practically for life. He was a trained lawyer whose position at the bar when he was appointed gave him a prestige which his elevation to the bench only emphasized. He had complete charge of procedure in the court room. He took an active part in the trial. He followed closely the questions of counsel. For the purpose of clearness, he often took the examination out of the hands of counsel and conducted it himself. He limited the cross-examination of counsel to matters that were of importance in the issue. He refused to permit the time of the court to be taken up with a cross-examination as to small and unimportant circumstances. And when it came to charge the jury, he not only told them what the law was, but he applied the law to the facts, commented on the evidence, frequently indicated an opinion as to the weight of the evidence, but left the decision finally to the jury. If counsel for either the prosecution or the defense had sought by argument to involve the real issue in obscurity and to introduce some other and irrelevant issue, it was his function to clarify the matter and 'brush away the cob-webs'; in other words, to simplify the question which the jury was to decide. In this way the histrionic talent of counsel, the facility for minimizing all important facts, and the exaggeration of unimportant circumstances were not permitted to affect the verdict of the jury if the court could remove their influence by sober and clarifying comment.

"Originally, and until a very recent date, there was in England no appeal from the action of a judge and the sentence of a court. The judge might himself reserve doubtful questions of law to a court of a number of judges who would decide the question, but there was no writ of error or appellate proceeding permitted. Now the appeal has been introduced in England, but introduced as it is as a modification of the old system, the appeal is permitted only in important matters and technicalities such as occupy so much of the appellate proceedings in this country are almost unknown. This prestige of the judge as a learned and skilled lawyer and his power in the conduct of the trial enforced a respect for his rulings and his intimations as to the proper course for the trial to take by both counsel for the prosecution and the defense, so that he always had the trial well in hand for the purpose of expedition and simplification of the issues. Nothing else can explain why in this country a murder case should take four weeks in its trial which can be disposed of in an English court of justice in one day or two days. And yet, with all this expedition and

certainty of punishment, whoever complains of injustice or oppression in an English court? Is not the administration of justice in that country the admiration of the world?

"I wish to comment on the effect that the change in the power of the judge in this country in the matter of the management of the trial has had upon his ability to shorten the trial and simplify the issues, and upon the methods of counsel for the defense and their conduct in the court room. One of the strongest influences for looseness in criminal trials in my judgment has been the presence of lawyers in our legislatures who have sought to abate and limit by statute the power of the judges and to take away from this source of respect for their rulings which is so apparent in every English court of justice. What I believe to be an unfounded fear of judicial tyranny and an unreasonable distrust of judges have led to statutory limitations upon their power in the conduct of criminal trials which have made the trial by jury in this country, and especially in the western states, an entirely different institution from what it was understood to be at the time of the adoption of our Constitution. In many states judges are not permitted to comment upon the facts at all. They are not even allowed to charge the jury after the arguments of counsel, but they are required to submit written charges to the jury upon abstruse questions of law with no opportunity to apply the principles concretely to the facts of the case, and with the result that the questions, both of law and fact, are largely left to the untutored and undisciplined action of the jury, influenced only by the contending arguments of counsel. The restraint that the judge in the course of a trial imposes upon the manner and conduct of counsel in an English court is thus wholly wanting, with the result that there seems to have been a substantial change in the code of professional ethics governing counsel and in the extremes to which counsel in the defense of their clients seem to think it is entirely proper for them to go. Their conduct makes neither for the dignity of the court, for the elevation of the ethics of the bar, for the expediting of criminal procedure, nor for the reasonable punishment of crime. These circumstances reduce the position of the judge from that place of power and usefulness occupied by the English judge to one in which the trial is largely conducted by the chief counsel for the defense, and those present in court are made to feel that the question at issue is not so much whether the defendant violated the law as whether the judge is violating it. And, now, not content with reducing the position of the judge to one something like that of the moderator in a religious assembly or the presiding officer of a political convention, the judge is to be made still less important and to be put still more on trial and to assume still more the character of a defendant by a provision of law, under which, if his rulings and conduct in court do not suit a small percentage of the electors of his district, he may be compelled to submit the question of his continuance on the bench during the term for which he was elected to an election for recall, in which the reason for his recall is to be included in two hundred words, and his defense thereto to be equally brief. It can hardly be said, my friends, that this proposed change, if adopted, will give him greater authority or power for usefulness or constitute a reform in the enforcement of the criminal law of this country. It will certainly not diminish the power or irresponsibility of counsel for the defendant. Let us hope that the strong sense of humor of the American people, which has so often saved them from the dangers of pathos and demagogery will not be lacking in respect of this nostrum."

SENATOR ROOT ON CIVIL PROCEDURE.—Senator Root's address as president of the New York State Bar Association was devoted to civil procedure. He made a strong case against an intricate

and lengthy written code of procedure—as illustrated in the Field Code of New York—and for a few general statutory rules, leaving the rest to the court itself as occasion arises. Like the address of President Taft on Criminal Procedure, Senator Root's paper marks out on broad lines the road to real reform in our procedure and the cause for the present state of delay and uncertainty in the administration of our law. Said Senator Root:

"It is not my purpose, in selecting the reform of procedure as the subject for the remarks which seem appropriate on the part of a presiding officer, to discuss these suggestions or to offer others relating to the details of the code. I wish rather to emphasize the general principle which we will all agree ought to control the acts of the state in dealing with this subject. The principle is, that procedure should be made as simple as possible. The fewer statutory rules there are to create statutory rights intervening between a citizen's demand for relief and the court's judgment upon his demand, the better. The more direct and unhampered by technical requirements the pathway of the suitor from his complaint to his judgment, the better. It seems to me that we have reached a point in our practice where the application of this principle requires very thorough and radical action; that mere improvement of the code of procedure in its details will not answer the purpose.

"The original Field Code of Procedure of 1848 contained 391 sections and was comprised in 169 of the small, loosely-printed pages of the Session Laws of that time. The last edition of our present code at which I have looked contains 3,384 sections, a large proportion of them dealing with the most minute details. It is doubtless true that some provisions of substantive law have found their way into this enormous mass of statutory matter, and that some special branches of procedure are covered by the present code which were not included in the original code. Nevertheless the comparison between the two statutes reveals plainly the fact that for many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process by which, under a multitude of varying conditions, suitors may get their rights.

"Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency inevitably leads to continual discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. Whatever we do to our code, so long as the present theory of legislation is followed the code will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong; the theory is wrong; and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone.

"We may well aid this simplification of procedure by applying the same principle of simplicity to certain changes in the substantive law with a view to making the practical application of the law simple; and, most important of all, we should observe that principle in determining the standards of conduct at the bar.

"The condition in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are overworked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, the dishonest man who seeks to evade his just obligations, is encouraged to litigate for the purpose of postponing them. Such a condition is not sporadic and occasional. It is

continually recurrent. It is the result of a natural tendency which appears whenever the conduct of affairs in any branch of the social life of man is entrusted to a particular class of men specially qualified for that special work by learning and skill beyond the great body of their fellows. The conduct of such affairs by such a class becomes an art. The art becomes a mystery. Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas, and belief in their importance supersedes the object which they were originally meant to subserve. Special training develops intellectual acuteness and fine and subtle distinctions. The sense of proportion is lost and the broad, simple, direct methods which alone are really useful in helping plain people to attain the substantial objects of practical life become entangled in a network of form and technical refinement.

"This tendency shows itself in some degree in every learned profession. It often affects the organization and control of political methods. It often affects the conduct and administrative regulation of government. History is full of illustrations of its working in religion. The development of the fine arts presents a record of a multitude of revolts against the results of its influence. It affects the development of substantive law. Most of all it characterizes the growth of legal procedure. There more frequently than anywhere else the system takes the place of the object for which the system was created. We need not go back for illustration to the Medes and Persians, or to the priesthood of Egypt, or ask why Cato wondered that the Roman Augur could keep from laughing when he looked a Roman Augur in the face; for the development of our own system of common law and equity is familiar to us all.

"We are now in about the same condition as respects a great mass of technical and specific rules obstructing the course of justice as we were in 1848 when the old law and equity practice of the state was swept away by the adoption of the Field Code—that great enactment which gave form to the procedure of practically every American state following the course of the common law, and which ultimately impressed itself upon the slow-moving but considerate judgment of the English people. We are now in about the same condition in this respect as was England in 1873 when the British Parliament passed the new Judicature Act and yielded to the principle of simplicity in litigation, the allegiance which she has ever since maintained and strengthened. Curiously enough, at about the same time when England adhered to the principles of the reformed procedure we were taking the first great step towards the abandonment of those principles by making the basis of our further development in procedure the revision of the code by my old friend, Mr. Montgomery Throop. There is but one way to deal successfully with the condition resulting from such a process, and that is not by palliatives in procedure but by revolution in procedure. The New York enactment of 1848 was revolution. The British enactment of 1873 was revolution. And it is revolution that we need now.

"Let me recall some of the effects of such a system as we now have, well known as they are to all of us. The system of attempting to cover every minute detail with legislation appropriate to every conceivable set of circumstances is to create a great number of statutory rights which the courts are bound to respect because they are the law; which suitors are entitled to demand because the law gives them. In some cases they may contribute to the attainment of justice. In other cases they may obstruct it. The courts cannot apply the rule of justice because they must apply the law. These artificial statutory rights become the subject matter of special litigation intervening between the demand for redress and the attainment of it.

"The energies of attorneys and counsel and clients, their time and labor, are devoted to these statutory proceedings instead of being addressed to the trial of the case. Pending the disposition of the multitude of motions

which it is possible to make, and which in number are often in inverse proportion to the merits of the case, the final disposition of the case is postponed. Serious and long-continued delay is the result in many cases. Witnesses die or leave the jurisdiction. Their memories become vague and the establishment of facts becomes more difficult. Suitors become tired and discouraged, or their means are exhausted. Conditions change, and the relief, when attained, is often deprived of much of its value.

The facilities for delay afforded by this system lead to innumerable defenses for the purpose of delay. These encumber the calendars and occupy the time of the courts, and prevent the hearing and decision of honest controversies. The system tends to breed a class of code lawyers, acute and subtle practitioners, skillful in baffling the efforts of honest men seeking to get their rights and with no conception whatever of the principles of jurisprudence or of the high duty of the advocate to secure substantial justice for his clients. At their hands justice is easily tangled in a net of form. The public estimate of the profession of the law is lowered. Public confidence in the administration of justice is weakened. The general effect of this great mass of statutory provisions as a whole is not to facilitate, but to impede and hamper the courts in rendering prompt and efficient justice.

"All this is wholly unnecessary. Our courts desire to do justice; they are competent to do it; and they will do it if left to themselves under the guidance of a few simple, fundamental rules and unhampered by a multitude of statutory requirements. They are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required.

"I have always thought that Judge Stephen Field's printed but unpublished little book called 'Early Days in California,' was most instructive to a student of the law. In the early period of the great gold excitement of 1849 some fifteen thousand men, mostly miners, found themselves collected in the mining camp of Marysville. In that hitherto almost unpeopled region there were no government, and no administration, there were no officers of the law, and there were no laws of which anyone there knew anything. The need of government was apparent and the miners got together and elected Stephen Field Alcalde of Marysville. Under that title he proceeded to hold court. There was no procedure. There were no laws to describe or define his powers. There were no statutes or precedents establishing the rights of the parties who came before him; but he heard complaints; and with the whole force of the general concurrence of that rude community, he required the persons complained of to answer. He tried and determined the issues. He enforced the judgments. He tried and punished offenders against those rules of right conduct which obtain generally in civilized communities, and he rendered justice to the satisfaction of Marysville and the peace and order of the community. It may be useful sometimes and it is refreshing always to look out from the refinements and subtleties of our sophisticated system for administering the law upon some simple and direct and swift enforcement of the fundamental principles of justice, and to question whether in all our elaborate contrivance of means to attain this end we may not be obscuring and forgetting the end itself.

"The real strength of the tendency to make provisions for arbitration of disputes in the rules of business organizations, rests upon a feeling that, if the members of the particular trade or branch of business can get away from lawyers and the law's delays and the cumbrous technical and expensive procedure of our courts, they can have the merits of their disputes determined swiftly, certainly, inexpensively, and adequately. I am inclined to think they are generally right.

"Consider the recent development of law administration in the Public Service Commissions, and the Interstate Commerce Commission of the United States. They have not yet embarrassed themselves by any code of procedure. They have not had time. Yet they are hearing and determining in a most adequate and satisfactory way questions of fact and law of the most complicated nature and of vast importance.

"It would be difficult to conceive of litigation more important or more complicated than the great controversies between nations which the civilized world is more and more tending to submit to the judgment of arbitral tribunals. Yet the Permanent Court of Arbitration at The Hague has practically no rules of procedure. It can't have them because the forty-four nations who are signatories to the Hague Convention for pacific settlement of international disputes differ so widely in their ideas of procedure that the adoption of any single system would be impossible. Accordingly that great convention, which first gave practical form to the hopes and aspirations that the apostles of peace on earth had been voicing for centuries, contained only a few very simple and fundamental provisions regarding the constitution of the court and the way to get a decision from it, leaving the field of procedure, in the main, to be determined by the common sense of the parties and of the court in conformity to the requirements of each case as it arises.

"I remember hearing Mr. David Dudley Field, during the argument of a cause many years ago, ask Mr. Charles O'Connor a question as to his position concerning the effect of the pleadings in the case. Mr. O'Connor turned, and, with that intensity which characterized him (especially when dealing with someone he did not like) he answered: 'I understand that under your code, Mr. Field, the plaintiff comes into court and tells his story like one old woman and the defendant comes in and tells his story like another old woman.' And that was all the satisfaction Mr. Field got. The reply was intended as a condemnation of the rather simple code of that day, but I am not sure that it was a condemnation. The old-woman method doubtless has its disadvantages, but I am not so sure that they are not to be preferred to subtleties of the special pleader and the code lawyer. If we could substitute for Mr. O'Connor's old woman a man of common sense with a reasonable knowledge of substantive law and a trained sense of materiality and relevancy we should have come very near the chief end and object of all legal procedure. I think it is safe to say that if we must choose between too much procedure and too little we better have too little.

"I wish to guard here against the misapplication of what I have said lest it have the effect of overstatement. It should not be inferred from what I have said about our procedure that in general, considering by itself each case which does come to a final judgment, the ends of justice are not attained. As a rule, in most cases which reach that point justice is done because we have honest and competent judges and an upright, independent, fearless, and loyal bar. Yet it is done in a great proportion of cases, not by the aid of, but in spite of, this vast multitude of statutory restrictions, and with an enormous waste of time and labor and expense and delay. I do not mean to be understood as asserting that a great part of the provisions contained in our code to not point out quite reasonable and proper methods of procedure to be followed in some cases to which they seem to be applicable, and probably in the cases which the legislature has had in mind in enacting them into law. Yet in a great number of other cases they are burdensome and obstructive; and it is true in general that the more detailed provisions of law are, the more certain they are to be misfits in many cases to which they come to be applied. I do not mean to say or to imply that the members of the bar are subject to just criticism for insisting in each case entrusted to them that their clients shall have the benefit of all the statutory rights which the legislature has provided. Sutors are entitled to the rights the law gives them. They are entitled

to have their counsel assert those rights and to have courts award them. I do insist, however, that the law ought to be such that what a suitor is bound to do or to suffer by way of means or preliminaries leading to a final decision on the merits of his case, should be determined, as far as possible, by the common-sense requirements of that particular case, and as little as possible by compliance or failure to comply with detailed and technical statutory requirements designed to cover ten thousand different cases as well as his. I do insist that, notwithstanding the many just decisions rendered by our courts, when we consider the prevalent delay, the unnecessary expenditure of time and effort and money, the hindrance of just rights through long-continued defensive litigation without substantial merit, the litigants who abandon their pursuit of justice through weariness or lack of means, the citizens who abandon their rights rather than incur the annoying and injurious incidents of litigation in the effort to enforce them, the emboldening of the unscrupulous in whose hands delay and difficulty and expense of litigation are weapons with which to force compromise without just grounds—when we consider all these incidents of our present condition we are bound to say that the general interests of the administration of the law require a thorough and radical change.

"The situation cannot be met by merely increasing the judicial force. We have often tried that expedient, but always ineffectually. The only real remedy is to be found in reforming the system.

"I have said that the most important thing of all toward re-enthroning the principle of simplicity and directness in attaining the ends of justice is that we ourselves shall observe that principle in determining the standards of conduct at the bar. No system will work well unless it is applied in good faith. Even though we may escape in a great measure from the statutory restrictions which now hamper the courts in applying the rule of justice in the particular case to the proceedings in that case, the rule cannot be successfully applied unless the sentiment of the profession—the public opinion of the bar, makes conformity to that rule a requirement of honorable obligation.

"What I have in mind may be illustrated by reference to two proposed provisions which have been much favored by our committees and which, it seems to me, should find their place among the simple and fundamental provisions of any system of procedure. One is, the provision that in every case a day shall be given when the parties, through their counsel, may come before a judicial officer informally for a rule regulating the further procedure in the case, covering the whole ground of pleadings, bills of particulars, discovery of documents, depositions of witnesses, mode of trials, etc.—the so-called omnibus summons provision. This would be a most useful substitute for the separate, successive motions under special statutory provisions now permitted, yet I can well see that its effectiveness could be largely destroyed if the bar generally were to attempt to evade it instead of accepting in good faith the opportunities which it would afford.

"The other provision is, that no error of ruling upon the admission or rejection of evidence or otherwise in a trial, shall be ground for reversal unless it appears that a different ruling would have led to a different judgment. Real acquiescence in such a rule by the bar would put an end to the incessant objections and exceptions which now disfigure so many of our trials. We share with England and her colonies a highly artificial and technical body of rules of evidence such as obtain nowhere else in the civilized world. These rules afford most delightful exercise for intellectual acumen, and they have some advantages. They have also great disadvantages, and it is by no means certain that in the long run they produce any better results than the simple and natural methods which obtain in the trial of cases in countries that follow the course of the civil law, and where the method of Mr. O'Connor's hypothetical old woman controls in the

giving of testimony as well as in the statement of the case. The fundamental disadvantage of this Anglo-American system of rules is the fact that, when strictly and technically applied, they do not correspond with the instincts or the habits or the ideas of common sense of any plain, sensible layman in this world. Their strict application continually impresses clients with a sense of injustice because they think they are not getting their case before the court, and it impresses witnesses with a sense of being bottled up and prevented from telling the truth. In the strictness and technicality with which we enforce those rules we go far beyond England or, so far as I know, any of her colonies. I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there again and again by objections to irrelevancy and immateriality and hearsay, when what he is trying to say would not do the slightest harm to anyone and would merely help him to state what he knows that is really competent and material. Such a rule as I have now mentioned would take away the faint hope of a technical reversal which underlies such objections; but the legal right to object would continue, and incessant technical objections would probably continue to prolong many trials and impede the speedy ascertainment of the merits of many causes unless the bar in good faith were to accept as a rule of conduct that no objection should be made or point raised not really affecting the merits.

"I presume upon your not remembering something that I said at Rochester a year ago to repeat that we are too apt at the American bar to act as if in litigation we are playing a game with the judge as referee of the game. Only the bar itself can cure that, and realize the highest usefulness of a noble profession by devoting its learning, its skill, and its best effort to securing for every suitor, as promptly as possible, a fair and final judgment on the merits of his case.

The complication of our procedure is only one phase of a general tendency affecting the whole field of government and law in the rapidly developing, intricate, and interdependent social conditions of our time. In the fundamental act at the polls, when the sovereign people select those who shall make the laws and shall administer them, the voter has placed in his hands a ballot of enormous size, sometimes too large to be spread out fully in the voter's booth, and with such a vast array of names for such a great number of offices to be filled, and with so many questions to be decided in the affirmative or negative, that the best trained and best informed mind must fail to do its whole duty intelligently. The need for simplification here is recognized by the advocates of the short ballot, who have my most sincere good wishes.

"The mass of our statutes has grown so great that the volumes constitute a library in themselves and require another library of indexes and digests and guides to ascertain what the law is. We are continually trying to simplify this condition by consolidations and revisions and codifications, all of which are useful.

The mass of judicial reports has grown so great that it begins to seem as if before long we shall have to burn our books like the Romans and begin anew. And indeed, where decisions can be found in support of every side of every proposition, authority is in a great measure destroyed and we do begin anew in determining by the light of reason which authority shall be followed. I wish that our judges could realize officially what so many of them agree to personally—that restating settled law in new forms, however well it is done, complicates rather than simplifies the administration of the law; that the briefest of opinions usually answers the purpose of the particular case; and that the general interests of jurisprudence justify reasoned opinions only when some question of law is determined which has not been determined before by equal authority.

"On every side the increasing complication of life calls for vigorous and determined effort to make the working of our governmental system more simple. Our primary concern as lawyers associated to consider the public aspects of our professional work and to promote the usefulness of the profession to the community, is with our own procedure."

INFECTION OF LEASED BUILDINGS.—The case of *Delano v. Smith*,¹³ noted in our last issue,¹⁴ finds a counterpart in a recent Canadian decision.¹⁵ A tenant took a house fraudulently pretending that it was for his wife to occupy during confinement, really for his children, then afflicted with diphtheria. The Ontario court held the landlord entitled to damages, Mr. Justice Riddell saying: "Upon principle, I see no difference in the present case from a case in which the tenant had allowed a quantity of filth to be placed upon the floors, ceiling and walls of the building. The bacilli of diphtheria are infinitely more deleterious to a residence, and dangerous to the health of any future occupant than mud or filth of any visible character."

PAROL PROOF OF LOST WRITTEN CONTRACT.—In an article in our last issue on Parol Proof of Writing Required by Statute of Frauds, it is stated that the Supreme Court of North Carolina held in a recent case,¹⁶ that where a contract to convey has been lost, parol evidence is not competent to show its contents for the purpose of enforcing it. One of the learned members of that court draws our attention to the statement and says that if the case is read carefully it will be seen that this point was not presented. There was, he says, no allegation or suggestion in the case that a contract had been made which was lost, and no offer, therefore, to show its contents by oral evidence. The court did state that the proof of the contract, under the statute, must be the written instrument itself, but it was referring to the particular facts of the case. The plaintiff did not propose to prove the contents of a lost instrument, but to show, by oral evidence that a contract had been made. The defendant had denied the contract and objected to the evidence. The difference between the two propositions is of course plain. The court was merely stating the general rule that where the contract is denied, or if admitted and the Statute of Frauds is specially pleaded, the plaintiff can recover only by showing the written contract, signed by the party to be charged, or his agent, where the oral evidence is objected to.

THE SUPREME COURT AND REVISION OF EQUITY RULES.—The Supreme Court of the United States is moving, too, in the direction of reform in procedure. For a time so long that the memory

¹³ 92 N. E. 500.

¹⁴ P. 284.

¹⁵ *McCuaig v. Lolande*, 180 W. R. 2, 757.

¹⁶ *Winders v. Hill*, 114 N. C. 614.

of the present generation runneth not to the contrary, this august tribunal has had statutory authority to revise and promulgate rules for practice and procedure in equity cases. Prior to its adjournment for the summer vacation it appointed a committee from its members with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practice under the rules as they now exist.

The members of this committee are the Chief Justice, Mr. Justice Lurton and Mr. Justice Van Devanter. It has requested the assistance and advice of the special committee on law reform of the American Bar Association, and it requests the co-operation of the several circuit courts of appeal of the United States. And it asks that judges and members of the bar who have suggestions to make or matter of value to submit to do so through the circuit courts of appeal of the United States.

HATS IN THEATRES AND PUBLIC POLICY.—A very amusing case has recently been decided by the English Court of King's Bench. It appears there had been quite an agitation in London about big hats worn by ladies at theatres. Mr. Curzon was the lessee of the Prince of Wales' Theatre, where the "Balkan Princess" was performed. Miss Isabel Jay, who took the leading part in the production, wore a hat which was said to solve the problem of the matinee hat. Mr. Dann, a press agent, conceived the idea of getting up a sensation of this kind. Two ladies in the biggest of big matinee hats were to take their place in the stalls of a theatre; behind them a gentleman was to be placed. On the ringing down of the curtain the gentleman was to appeal to the ladies to remove their hats. The ladies were to refuse. The manager, Mr. Curzon, was to be summoned. He was to insist on the ladies removing their hats or quitting the theatre, and on their refusal a technical assault was to be committed for the purpose of ejecting them. Then there was to be a case in the police court with all its attendant notoriety; and what better advertisement could a manager's heart desire? The little drama was duly played out, the magistrate, who thought everything was *bona fide*, discharged the manager on the ground that he had a right to eject the ladies for refusing to obey the rules against hats. The ingenious author of it and his wife, who had acted a part in it, sued for the sum agreed for their services—\$500. They were nonsuited on the ground that the contract was void as against public policy, for two reasons: the ejection of the ladies might have provoked a breach of the peace by sympathizers; and the police court proceedings were a fraud on the administration of justice. On appeal to the King's Bench the decision was affirmed. Mr. Justice Phillimore said

that the ladies had given a license to defendant to put his hands on their shoulders. His lordship doubted whether they could, without perjury, have got the matter on its legs before the magistrate, in the circumstances, if they had told the magistrate it was part of the agreement that defendant should lay his hands upon them. The magistrate would have at once dismissed it. "They must have gone very near the wind," proceeded his lordship, "in their evidence, to get the case as far as it went." It was a matter under which the criminal court was to be asked by two parties to adjudicate on that which, in the view of another was a crime, and which, by agreement between the parties, could not be. Not merely was it a mockery of public justice, a waste of public time, but as he had said two ladies must have put a man in peril for that which they knew he ought not to be put in peril, and they must have gone very near saying that which was not at any rate the whole truth. He supported the finding of the county court judge on the grounds of "public policy." The agreement was extremely mischievous to the public, and it was on that ground that defendant was successful. Mr. Justice Horridge agreed. He said he was not sorry the result of the action was a failure on the part of the plaintiff to succeed and the defendant to get his costs, because he thought a more objectionable agreement it was hard to conceive. It was an agreement to make a plaything of the administration of justice for the purpose of advertising a theatre.

THE CONDUCT OF A MULE AS EVIDENCE.—In *Wilson v. State*,²¹ on a trial for murder, where it was alleged that the shot which killed the deceased, who was driving some mules at the time, came from near a certain stump at the side of the road, the trial judge allowed the state to prove that one of the mules driven by deceased at the time he was killed became frightened and shied when subsequently driven or ridden past the stump in question. And a witness who had fifty years' experience with mules testified that it was their nature and custom to take fright when passing a point where they were previously frightened.

On appeal the evidence was held admissible. The force of this evidence, said the court, would have been strengthened by proving that this mule did not previously take fright when passing this black stump, and the fact that this fact was not shown might weaken the probative force of this evidence, upon the theory that the mule may have been afraid of the stump, as it is a matter of common notice that horses and mules will often and repeatedly shy at certain things, although having previously passed them without hurt or harm; but the evidence was admissible, and the weight of same was a question for the jury.

²¹ 54 South. 572.

SELF DEFENSE—RETREATING TO THE WALL.—That the old English doctrine that a person attacked by another must retreat to the wall before he may use a weapon in his defense is not the law of the United States, is shown in a recent Nebraska case. The question presented on the trial—which was a civil action for assault and battery—was whether the defendant made an unprovoked assault upon the plaintiff with a cleaver, as well as that whether the defendant was suddenly attacked and instinctively interposed the cleaver in defense. It appeared that the plaintiff was larger and more powerful than the defendant, and that the parties during the affray occupied common ground. Said the court:

"Bearing in mind that the one party had no advantage over the other because of the location where the difficulty occurred, that the plaintiff was not armed with any weapon, and that the defendant does not contend that he believed the plaintiff was thus armed, we should put aside those cases where the plea of self-defense was interposed to a complaint for injuries inflicted in repelling an armed antagonist. This court is not committed to the doctrine that a person unlawfully assaulted must fly to the wall before he may lawfully strike a blow in self-defense, but, on the contrary, we have said as a general proposition that a person unlawfully assaulted may stand his ground and repel force by the exercise of such force as to him reasonably seems necessary to protect his person or property from injury. While the general proposition is sound, it cannot be successfully invoked to justify the use of force or weapons out of all proportion to the necessities of the case. A meat cleaver in the hands of an adult is a dangerous weapon, and its use to repel an ordinary assault should not be disproportionate to that assault. Of course, if the cleaver were raised instinctively by the defendant so that the plaintiff's arm came in contact therewith while he was attempting to strike the defendant, the defendant would not be liable. The plaintiff argues that, because the defendant so testified, the instruction criticised, if erroneous, could not have prejudiced him. We are of opinion, however, that the defendant could not lawfully use the cleaver whether by striking the plaintiff or by placing it in position where the plaintiff would collide therewith without some justification; that his justification in this case is the defense of his person from an unlawful assault and that since his requests to charge presented that thought, he was entitled to have the subject fairly presented to the jury in the court's instructions."²⁰

PROHIBITING BY LAW THE WASTE OF MINERAL WATER.—A further illustration of the wide extent of the state police power as found in the recent decision of the United States Supreme Court affirming the validity of a statute of New York "for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters." The Supreme Court decides that a landowner engaged in collecting and vending as a separate commodity the carbonic acid gas con-

²⁰ Hoover v. DeKlotz, 130 N. W. 1052.

tained in natural mineral waters existing in a common underground reservoir is not deprived of his property without due process of law, under a statute which forbids him from pumping or otherwise artificially drawing by means of wells on his property unnatural quantities of such waters from the common source of supply and wasting them to the injury or impairment of the rights of other proprietors.²⁵

THE PURE FOOD LAW AND SUMMARY SEIZURES.—In construing this Federal law, the United States District Court in Minnesota rule that it does not authorize the seizure and forfeiture of illegal foods by a private person. The court says that a fair construction of the Food and Drugs Act does not require a holding that the seizure mentioned therein can be made by a private person. Such a provision would seem to be contrary to the general policy of the law in seizure cases. As is seen hereafter, in almost all of them specific statutory provisions have authorized determined persons to make such seizures. To allow a private person to enter upon the premises of another, without any warrant or authority of law whatever, and to search and to seize any property which he might think was subject to confiscation, even though he did so at his peril, might lead to breaches of the peace and the disturbance of the public order. Whether the common law which allowed such a proceeding would be consistent with our constitutional provisions relating to seizures and searches presents a question of some difficulty. It cannot be held that the act in question intended to allow such a proceeding. There is nothing therefore, in the law which authorizes any private person or public officer to make the seizure prior to the commencement of some proceeding in court.²⁶

LIABILITY OF INFANT FOR NEGLIGENCE.—The Supreme Court of Wisconsin has decreed a very interesting point regarding an infant's liability for negligence. The facts were that plaintiff, a boy about ten years old, and defendant, a boy of the same age, attended the same school and were friends. At recess both were playing in the schoolyard, and as plaintiff was kneeling to shoot marbles defendant came running around the schoolhouse, being chased by another boy, and accidentally ran into the plaintiff, knocking him over, and so injuring plaintiff's eye that its sight was destroyed.

The Supreme Court affirms the well-settled rule that an infant is responsible in damages for his torts and negligence and unlaw-

²⁵ *Lindsay v. Natural Carbonic Gas Co.*, 31 S. C. 337, approving *Hathorn v. Gas Co.*, 194 N. Y. 326;

People v. Gas Co., 196 N. Y. 421.

²⁶ *U. S. v. Two Barrels of Eggs*, 185 Fed. 302.

ful acts. But it holds the defendant not liable, because he was not doing an unlawful act nor according to the standards, and habits of children in their play was he doing a negligent act. A child is required to exercise that degree of care only which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity and understanding of the child. The very purpose of the schoolyard is to allow opportunity for children to play therein, and the more vigorous the exercise which they take during the brief recesses given them the better is the purpose of the schoolyard subserved. The venerable and exhilarating game of tag in its various forms must have been one of the primal games of the race, and it still occupies an honored place among the sports of childhood. Usually harmless and free from danger to participants and bystanders, it seems not a sport to be discouraged or deprecated, but rather to be encouraged on account of its wholesome activity and stirring of the blood. And the court would not wish to do anything which would seem to make it necessary for children to stand about the schoolyard with folded hands at recess for fear they might negligently brush against one of their fellows and become liable for heavy damages.²⁹

LIABILITY OF SCHOOL BOARDS FOR INJURIES TO PUPILS.—Two recent cases in England are upon the liability of school boards for negligent injuries to pupils.

In *Smith v. Martin*, a girl of fourteen was a pupil in a public elementary school. Her teacher sent her to poke the fire and draw the damper of the stove in a room in which the teachers had their meals. The girl's pinafore got on fire and she was severely burned. In an action the jury awarded \$1,500 damages, but the judge gave judgment against the teacher and in favor of the education board. The Court of Appeals holds the board liable on the ground that the relation of the education authority to the teacher was that of master and servant, so that the principle *qui facit per alium facit per se*, upon which the master was made responsible for the act or omission of his servant, was applicable, and, further, that the direction given by the teacher to the plaintiff was not outside the scope of her employment.

In the other case, *Shrimpton v. Hertfordshire County Council*, the House of Lords held an education authority liable to a child of thirteen who was injured by falling from an attendance van, because the authority had negligently omitted to provide a conductor to see the children safely in and out of the van.

²⁹ *Briese v. Moechtile*, 130 N. W. 893.

SELF DEFENSE—OWNER OF LAND—PLAGUE OF LOCUSTS.—In a late case before the judicial committee of the English Privy Council on appeal from the Supreme Court of the Cape of Good Hope, it was decided that the owner or occupier of land has a right to repel an extraordinary misfortune coming to him by way of his neighbor's land, though the effect may be to transfer the mischief from his own land to that of his neighbor. Therefore, where A endeavored to drive a swarm of locusts, which were moving from B's land, away from his own land, and so caused them to remain on B's land, it was held that he was not liable for the damage thereby caused to B's crops.

Said Lord Robson in delivering judgment reversing that of the Colonial Court:

"In Whalley's case, Lindley, L. J., points out that, if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season. On the facts as found in this case their Lordships are of opinion that the respondents did no more than that which Lindley, L. J., has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving."²³

²³ *Greyvensteyn v. Hattingh*, 104 L. T. 360.

NOTES OF RECENT DECISIONS.

ACTION—NOVELTY OF CLAIM.—While the novelty of an action is not conclusive against the right to maintain it, it justifies the exercise of extreme caution in permitting it when it involves the new application of recognized rules of law or equity.¹

ALIENS—POWERS OF CONGRESS.—Congress has power to legislate with reference to undesirable aliens desiring to enter the United States, and also with reference to the deportation of undesirable aliens already within the United States.²

ALTERATION OF INSTRUMENT.—Where the alteration of a note bearing interest from maturity by the addition of the word "date" after the word "maturity" was neither covinous nor fraudulent, but was made with the honest purpose of making it conform to the real agreement of the parties, the alteration does not discharge the maker from his liability on the original indebtedness.³

ANIMALS—NEGLIGENCE.—That a dog was unlawfully permitted to run at large unmuzzled does not make the owner liable for injury caused by the dog unless lack of the muzzle proximately caused the injury, and hence an owner is not liable for injury caused by an unmuzzled dog running against a pedestrian in playing with another dog.⁴

ATTORNEYS—ADVERTISING—DISBARMENT.—An attorney who published and advertised a pamphlet to attract non-residents to the state to apply for divorce through him will be shown leniency, and suspended for only eight months, and till the further order of the court; he having discontinued the advertising when his attention was called to his methods being condemned by the bar association of the city, and his being the first case of the character brought to the attention of the court.⁵

ATTORNEYS—CONSTRUCTION OF CONTRACT FOR COMPENSATION.—An attorney contracted to prosecute a suit for a contingent fee of one-third of the recovery. He sued on a *quantum meruit* for extra services in defending against a counterclaim. *Held*, that these services are within the contract.⁶

AUTOMOBILES—RACING IN STREET—LIABILITY OF CITY.—Where a spectator was voluntarily present to witness automobile races on a public highway, illegally authorized by the city council, his administrator could not recover against the city for his death, resulting from being struck by an automobile swerving in its course and leaving the highway, on the theory that the contest was illegal in the absence of proof of negligence.⁷

BANKRUPTCY—JURISDICTION OF FEDERAL COURTS—SUMMARY PROCEDURE.—Just before the filing of a petition in bankruptcy the treasurer of the bankrupt corporation took money of the corporation and left the jurisdiction of the bankruptcy court. He returned a year later. The referee found that

¹ *Beach v. Bryan*, 133 S. W. 635, Mo.

² *Haw Moy v. North*, 183 F. 89.

³ *Baldwin v. Nat. Bank*, 133 S. W. 864, Tex.

⁴ *Forsythe v. Kluckhohn*, 129 N. W. 739, Ia.

⁵ *In re Schnitzer*, 112 P. 848, Nev.

⁶ *Payne v. Davis County*, 129 N. W. 823 (Ia.).

⁷ *Bogart v. City of New York*, 93 N. E. 937, reversing 122 N. Y. S. 1122, 138 App. Div. 888, N. Y.

he had a part of the money still in his possession, though he denied this. *Held*, that the bankruptcy court may make a summary order that he turn over this money to the trustee.⁸

BANKS AND BANKING—PRINCIPAL AND AGENT—MONEY PAID INTO AGENTS' ACCOUNT.—When a principal places money in a bank on the terms that a known agent shall draw upon it, he retains the power, if he rightly determines the agency, to require the bank to return the undrawn balance to him.⁹

CARRIERS OF GOODS—DISCRIMINATION AND OVERCHARGE—CARLOAD RATES TO FORWARDING AGENTS.—A railroad had lower rates for carload lots than for less than carload lots, and made a rule denying the advantages of this to forwarding agents who had been combining small shipments into carload lots and shipping at the lower rate. The Interstate Commerce Commission decided that this rule was unjust and discriminatory. *Held*, that its decision is correct.¹⁰

CARRIERS OF GOODS—MERCHANDISE AS BAGGAGE—NOTICE.—P. as a passenger checked his trunk which contained merchandise of great value, without notice to the carrier that it contained anything but ordinary baggage. The trunk was lost and P. sues for value of its contents. *Held*, that P.'s silence as to the nature of the contents of the trunk will prevent him from recovering.¹¹

CARRIERS OF GOODS—VENTILATING CAR.—Where a shipper directed the carrier in a bill of lading to carry bananas with the ventilators of the car closed and the plugs all out, and the carrier closed the ventilators but left the plugs all in, the principle that the carrier is not responsible for loss or injury to goods occasioned by their being improperly loaded by the shipper has no application, and the carrier is liable for injury occasioned by violating the instructions.¹²

CARRIERS OF GOODS—BAGGAGE DESTROYED BY FIRE.—A statute provides that railroad companies shall be liable for the destruction of property by fire or from any locomotive used, or caused by any employe or servant of the corporation in the operation of the railroad. *Held*, intended to cover losses resulting only from such fires as were caused by or resulted from the operation of a train, and did not include a fire by which a passenger's baggage was destroyed while in a railroad depot, not set by the operation of trains.¹³

CARRIERS OF PASSENGERS—INJURY TO TRESPASSER.—One who was not a passenger, nor a servant of the company, in contravention of the regulations of the company, got on to the platform of a car in an empty train of the P. Co., which, in pursuance of an arrangement between the companies, was being shunted over the line of the defendant company. He had no permission or license so to use the car, and did so in order to get a lift along the line on his way home. There was evidence that he had done the same thing on other occasions. The car on which he was came into collision with a train of the appellant company in consequence of the negligence of those in charge of that train, and he was seriously injured. *Held*, that the defendant company were not liable for the injuries so caused.¹⁴

⁸ *In re Meier*, 27 Am. B. Rep. 272.

⁹ *Societe Coloniale v. Bank*, 104 L. T. 499, Eng.

¹⁰ *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. Co.*, 31 Sup. Ct. Rep. 392, U. S.

¹¹ *Nathan v. Woolverton*, 127 N. Y. Supp. 442.

¹² *Texas & R. Co. v. Davis Co.*, 133 S. W. 309, Tex.

¹³ *Kansas City Southern R. Co. v. Thomas*, 133 S. W. 1030, Ark.

¹⁴ *Grand Trunk R. Co. v. Barnett*, 104 L. T. 362, Eng.

CARRIERS OF PASSENGERS—INTOXICATED PASSENGER.—That a passenger is drinking or under the influence of liquor is not enough to require the trainmen to give him any more care than to other passengers; but it is only when a passenger is so much under the influence of liquor as to be helpless or irresponsible or incapable of protecting himself from accident, and his condition is, or in the exercise of ordinary care can be, known by them, that they are under a duty to give him any extra care.¹⁷

CARRIERS OF PASSENGERS—JOLTING OF CARS.—Jerks while running, and in stopping and starting to let off and take on passengers, jolts in going over frogs or switch points, and lurches in going around curves, are among the incidents in electric cars which every passenger must expect; and if a passenger is injured by such a jerk, jolt, or lurch, the company is not liable. On the other hand, a car can be started and stopped with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence.¹⁸

CONCEALED WEAPONS—CIVIL LIABILITY—ACTS DONE IN OBEDIENCE TO ORDERS.—The defendant, a militiaman on riot duty, under orders to arrest all passers-by carrying concealed weapons, arrested the plaintiff who had a pistol in his buggy. The plaintiff sued for false imprisonment. *Held*, that he may recover.¹⁹

CONFLICT OF LAWS—REMEDIES—RIGHT OF ACTION—VENUE OF ACTION FOR USE OF LANDS.—The defendant had been adjudged by an Idaho court to be a trespasser on the plaintiff's land there situated, to which he had claimed title. The plaintiff brought an action in Washington to recover the reasonable rental value while the defendant was in possession. A statute permitted a recovery of reasonable rent if the defendant was in possession without the consent of the true owner. *Held*, that this action being transitory may be maintained in Washington.²⁰

CONSPIRACY—PUBLIC OFFICERS.—Councilmen of a city who have entered into a conspiracy to accept bribes for passing certain ordinances cannot defend against the charge of conspiracy on the ground that they had been lured into the act by detectives proposing to them a scheme which the detectives had no intention or ability to carry out, as a clear distinction is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals.²¹

CONSTITUTIONAL LAW—EX POST FACTO LAW.—A statute providing that a person who is known to be a pickpocket, thief, or burglar, and having no visible or lawful means of support, if found prowling around enumerated public places, shall be deemed a vagabond, makes one liable for his act in prowling around a public place, without any visible or lawful means of support; and the commission of the crimes referred to is not a misdemeanor, for which prosecution may be had, but the previous crimes are only considered in creating the offense, so that the statute is not invalid as an *ex post facto* law.²²

¹⁷ Louisville R. Co. v. Gregory, 133 S. W. 805, Ky.

¹⁸ Work v. R. Co., 93 N. E. 693, Mass.

¹⁹ Franks v. Smith, 134 S. W. 484, Ky.

²⁰ Sheppard v. Coeur d'Alene Lumber Co., 112 Pac. 932, Wash.

²¹ Commonwealth v. Wasson, 42 Pa. Super. Ct. 38, Pa.

²² Commonwealth v. Ellis, 93 N. E. 823, Mass.

CONSTITUTIONAL LAW—EQUAL PROTECTION—PRACTICING LAW.—A statute provides that any officer of any municipality, who shall act as the attorney for any public utility corporation doing business in the corporate limits of the municipality, must on conviction be fined, etc. *Held*, that the statute did not violate Const. U. S. Amend. 14, relating to the equal protection of the laws, on the ground that it discriminated against corporations, or placed unreasonable and arbitrary restrictions upon the occupation of practicing law.²³

CONSTITUTIONAL LAW—DESTROYING PROPERTY.—An ordinance providing for inspection of milk and tuberculin test, and destruction of milk from diseased cows, does not violate Const. U. S. Amend. 14, or Const. Wis. Art. 1, Sec. 13, as depriving owner of property without due process of law, when the destruction is necessary to preserve the public health.²⁴

CONSTITUTIONAL LAW—CORPORATIONS ENTITLED TO PRIVILEGE AGAINST SELF-INCRIMINATION.—A *subpoena duces tecum* was issued out of a Federal court addressed to a New York corporation to compel it to bring its books and papers before a grand jury, which was investigating certain alleged violations of the customs laws of the United States by the corporation. The corporation resisted the *subpoena* on the ground that it compelled it to incriminate itself in violation of the Fifth Amendment of the Constitution of the United States. *Held*, that the corporation must obey the *subpoena*.²⁵

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION.—The defendant was indicted under a statute providing that an operator of an automobile, who does damage to persons or property, must report to a police officer his name, address, and license number, and the fact of the injury. The New York Constitution provides that no one shall "be compelled in any criminal case to be a witness against himself." *Held*, that the statute is unconstitutional.²⁶

CONTRACTS—CONFIDENTIAL RELATIONS.—A contract whereby plaintiff agreed with defendant in consideration of one-half of the profits to negotiate a sale of land to persons with whom plaintiff sustained the closest friendly relations, and to make use of the confidence in which they held him to prevail upon them to make the purchase, concealing any interest he himself had in the outcome, was a contract involving the perpetration of a deception amounting to a fraud, and is unenforceable, as opposed to public policy.²⁷

CONTRACTS—ADDITIONAL LABOR NOT PROVIDED FOR—RECOVERY.—A contractor, who agreed to construct a house in a workmanlike manner, being bound without additional consideration to put in a foundation for the cellar walls where the wetness of the soil rendered one necessary, though such a foundation was not called for by the contract or contemplated when it was made, he could not recover on the owner's promise to pay for this extra work, as the promise was without consideration.²⁸

DEFAMATION—ABSOLUTE PRIVILEGE—JUDICIAL PROCEEDINGS.—Defendants caused to be signed and presented to a police justice a petition asking that plaintiff and his wife be required to vacate the premises where they resided on the ground that they were "disturbers of the peace, quarrelsome

²³ Boone v. State, 54 So. 109, Ala.

²⁴ Adams v. City of Milwaukee, 129 N. W. 518, Wis.

²⁵ In re Borun Hat Co., 184 Fed. 506.

²⁶ People v. Rosenheimer, 44 N. Y. L. J. 1629.

²⁷ Simon v. Garlitz, 133 S. W. 461, Tex.

²⁸ Creamery Package Mfg. Co. v. Russell, 78 A. 718, Vt.

and a general nuisance to the peaceful citizens about them." It did not appear that the police justice directed the preparation of the petition. *Held*, that the statements made in the petition were absolutely privileged so far as the proceedings before the justice was concerned."

DEFAMATION—CRIMINAL LIBEL.—A communication, false in fact, addressed to the general public, imputing the commission of a criminal offense or moral delinquency to a public officer in the discharge of his official duty, is not privileged, though made in good faith and on probable cause; the motive in such case being wholly immaterial."

DISTURBING THE PEACE—SELF-DEFENSE.—For a person to defend himself against a felonious assault, even though in doing so he fires a pistol and thereby disturbs a nearby congregation assembled for divine worship, is not ordinarily to be considered such conduct as violates a statute punishing a disturbance of religious services."

INSURANCE, FIRE—INCREASE OF HAZARD.—Defendant company issued a policy to the plaintiff which provided that the policy should be void in case of increase in the hazard by any means within the control or knowledge of the insured. An unknown incendiary made an unsuccessful attempt to burn the building, but the insured did not notify the company of the attempt. A second incendiary attempt was successful. In an action on the policy, *held*, that the circumstances did not amount to an increase of hazard such as would vitiate the policy."

LIMITATIONS—PRESUMPTION AT COMMON LAW.—The common law fixes no time within which actions must be brought, and the expiration of a period less than 20 years does not create the presumption of satisfaction, and does not bar an action."

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—It is not negligence *per se* for a pedestrian to converse with a companion while walking along a sidewalk, as affecting the city's liability for injury caused by a defect in the sidewalk."

OFFICERS—RIGHT OF RETIRING OFFICER TO REMOVE INDEX INSTALLED BY HIM.—A city treasurer, whose duty it was to keep voluminous assessment records, installed an improved card index system at his own expense. This he was not required by law to do. His successor applied for an injunction restraining him from removing the index. *Held*, that the injunction should be granted."

PAYMENT—MISTAKE OF FACT.—Money paid under a mistake of fact which the payor was not legally bound to pay may be recovered back, unless he has derived a substantial benefit from the payment, or the payee has received it in good faith in satisfaction of an equitable claim, or it was due the payee in equity and good conscience, and, where money was paid to a contractor through mistake of fact, the mere fact that the contractor paid it out to his subcontractors before he knew the money was paid to him by mistake would not prevent the payor from recovering such money."

* *Flynn v. Boglarsky*, 129 N. W. 674, Mich.

* *Oakes v. State*, 54 So. 79, Miss.

* *Cummings v. State*, 69 S. E. 918, Ga.

* *Williamsburgh Ins. Co. v. Weeks Drug Co.*, 132 S. W. 121, 133 S. W. 1097, Tex.

* *Warrior Coal Co. v. N. Bank*, 53 So. 997, Ala.

* *Kelley v. Kansas City*, 133 S. W. 670, Mo.

* *Robison v. Fishback*, 93 N. E. 666, Ind.

* *Houston Co. v. Hughes*, 133 S. W. 731, Tex.

PRIVACY—NATURE AND EXTENT OF RIGHT.—The defendant merchants published a picture of the plaintiff without his consent in a newspaper advertisement. *Held*, that the plaintiff can recover for the invasion of his right of privacy.⁴⁸

SUNDAY—ADVERTISING IN NEWSPAPER.—Where an order was given for the insertion of advertisements in the issues of a newspaper published on Sundays, and it was shown that the two last editions of the newspaper were printed, mailed, and delivered on Sunday morning, and that the advertisements were inserted in all of the editions issued on those Sundays, the parties stipulated for the performance of labor on Sunday in violation of Rev. St. 1899, Sec. 2240 (Ann. St. 1906, p. 1420), making it a misdemeanor to labor or perform any work on Sunday other than the household offices of daily necessity, or other works of necessity, so that the contract was void and would not sustain a recovery for the agreed price.⁴⁹

STATE—ACTION AGAINST.—An action against the board of commissioners for the management of a State penitentiary to reform, for mistake, a contract made with its predecessors for the purchase of land, so as to provide for the conveyance of less land and recover the agreed price, is an action against the State within Const., Art. 5, Section 19, providing that the State shall never be made a defendant in any of her courts.⁵⁰

TELEGRAPHS—ERRONEOUS TRANSMISSION—DAMAGES.—Where plaintiff's telegram to a customer, offering to sell at a certain price, was erroneously transmitted, so as to make the offer at a lower price, and the addressee, on the basis of the message being correct, accepted and made a resale at a price which would have involved a loss on the basis of his paying the price quoted by plaintiff, plaintiff having, after knowledge of the error, shipped the goods at the price as transmitted to protect its customer, may recover of the telegraph company its loss in so doing, not exceeding the difference between the price as quoted and transmitted.⁵¹

TELEPHONES—NEGLIGENCE—PROXIMATE CAUSE.—Negligence of a telephone company in putting a telephone wire running into a house near an electric light wire and on a rotten post, so that a wind, breaking the post, brought the wires in contact, is a proximate cause of the death of the proprietor of the house, making it liable therefor, notwithstanding any intervening negligence of the electric light company, which, having turned off its power on notice from such proprietor, turned it on again while he was clearing away the telephone wire; negligence, resulting in injury, being a proximate cause thereof, when it is of such a character that by the usual course of events an ordinarily prudent man ought reasonably to have anticipated, some injury would in some manner result therefrom.⁵²

WATERS—ACCRETION—APPLICABILITY TO WATERS ACTUALLY NON-NAVIGABLE.—The coast lands of the plaintiff and the defendant were divided by an inlet. The maximum depths of its channel were seven feet at high tide, and three feet at low. It shifted laterally at the rate of four hundred feet each year, so that it ran through the defendant's land; the process being one of erosion on one side of the inlet and deposit of sand on the other. *Held*, that the plaintiff has no title to the strip between the former and present channels of the inlet.⁵³

⁴⁸ *Munden v. Harris*, 134 S. W. 1076, Mo.

⁴⁹ *Publishers: Geo. Knapp & Co. v. Culbertson*, 133 S. W. 55, Mo.

⁵⁰ *Jobe v. Urquhart*, 136 S. W. 663, Ark.

⁵¹ *Eureka Cotton Mills v. Tel. Co.*, 70 S. E. 1040, S. C.

⁵² *Cumberland Tel. Co. v. Woodham*, 54 South. 890, Miss.

⁵³ *Town of Hempstead v. Lawrence*, 70 N. Y. Misc. 52.

THE DOCKET.

THIS month the DOCKET has no desire to criticise either laws or courts. He is on his vacation again and this time he has selected a city in Canada on the north shore of Lake Ontario. But he is realizing that during the summer months, with the exception of the Pacific slope, the whole of the North American continent, from Winnipeg to New Orleans, is a tropical country and that for most of the time whether you are in St. Paul or Boston or St. Louis or Toronto, the temperature will be just about the same as it is in Cairo, or Bombay. In this Canadian city for ten days the mercury has stood between 95 and 103. The Lady of the Snows has become the Lady of the Tropics, and the reputation of the Dominion as a summer resort is irretrievably lost.

FOR a good many years the DOCKET has kept a Commonplace Book which has now grown to several manuscript volumes. In these he has jotted down from books old and new, reminiscences and anecdotes of lawyers and judges; and instead of his bi-monthly criticisms of the law and the courts, he will this time give to his readers some of the good things which the Book contains. They may be new or they may be old, but at any rate they will be interesting, he believes, to his professional brethren; and certainly they will be pleasanter vacation reading than arguments for the reform of legal procedure, or against an elective judiciary or the like.

FROM Cockburn's Circuit Journeys, an old Scotch biography, we learn that the method of pronouncing sentences on prisoners has changed more than once. The judges a century ago used generally to abuse the prisoner; then came a period when the judge thought it his duty to lecture and sermonize. A Scotch judge in a case of bigamy after explaining the usual atrocities of the offence, such as the perfidy and cruelty to both women, the confusion and destitution of families, and so forth, continued: "All this is bad; but your true iniquity consists in this, that you degraded that holy ceremony which our blessed Saviour condescended to select as the type of the connection between him and his redeemed church." Another judge who was dooming a man to die for the murder of a female who lived with him, after pointing out to the prisoner the atrocity of his crime concluded:—"If she had been your wife, there might possibly have been some apology for you, on account of the difficulty of getting quit of a

wife in any other way. But this unfortunate woman being only your associate, you might have freed yourself from her whenever you chose." Certainly his lordship is entitled to the credit of the discovery that it is a less crime to murder a wife than to murder a mistress!

IN Edwards' Recollections we find a striking sermon to an acquitted prisoner. On the trial of Christian Smith for murder at Richmond, N. Y., in the year 1817, Judge Van Ness, who presided, charged the jury that the evidence would warrant a finding of guilty; but on that subject they were the judges of the law and fact; but he could not forego advising them that the evidence afforded the prisoner no chance of escape. His conduct before and after the commission of the crime had been brutal and barbarous in the extreme, and he was not a safe member of society. The jury were out seven hours and on their return pronounced a verdict of not guilty; whereupon the judge thus addressed the prisoner: "Christian Smith, you have been tried and acquitted by a jury of your country for having taken away the life of one of your fellow creatures. I mean not to censure the jury who acquitted you; it is not my province so to do. I hope they will be able upon future consideration to reconcile their verdict to their consciences. But I should feel myself wanting in my duty as a man if I did not express my opinion that, notwithstanding their verdict, I consider you a guilty, a very guilty man. Upon an ancient grudge you considered yourself justified in doing what you have done; and the jury have, I fear confirmed your false and fatal judgment. But beware! you have not yet escaped. Believe me, your most awful trial is yet to come. You are now an old man and your days must be few in this world; and you will shortly be compelled to appear before another court where there is no jury but God himself. Unless you repent and devote your future life to an humble atonement of your guilt, your condemnation is certain. I am thus plain with you, in order that those who have listened to your trial may learn, that, whatever may be considered to be the law of Staten Island, your conduct is unjustifiable in the sight of God and man."

COCKBURN tells of a child murder case in Scotland where the doctors differed as to their scientific "tests" of the child having been born alive. Its throat was found crammed full of bits of coal, and there were the marks of a thumb and two fingers on the outside of the neck. These practical tests had little effect upon the medical opinion. Whenever any of the murderous appearances, such as the finger-marks on the neck, was put to one of the doctors in defence, the scientific gentleman, after parading his vast experience, always stated that however these things

might startle the ignorant, they were of no consequence to a person of great practice, and that he had seen hundreds of children born with these very marks. "Ay, but, doctor," said an aggressive-looking jurymen, "did ye ever see ony o' them born wi' coals 'i their mooth?"

SIR WALTER SCOTT attended a trial of a woman for murder by poisoning. She was acquitted, and as he walked from the courtroom the great author remarked to his companions, "Well, sirs! All I can say is, that if that was my wife, I should take good care to be my own cook."

FROM Pierce's Life of Charles Sumner, the DOCKET's Common-place Book contains numerous extracts. While he was in Paris he attended daily the French courts and here is a good illustration which he witnessed of the difference between continental and Anglo-American rules of evidence: The accused was partly identified as the person who committed the alleged theft through the medium of a handkerchief, which had been found in the place where the theft had been committed. The evidence was quite strong that this handkerchief belonged to the prisoner. His advocate, in his defense, stated that he had seen the washerwoman of the accused and described to her the handkerchief in question, and she had said that she had never washed such a handkerchief for the prisoner. The court at once admitted the advocate as a witness, to state what the washerwoman had told him.

IN a letter to his friend Hilliard, Sumner describes a dinner party in England where he met many of the literary celebrities of the day: "Landor's conversation was not varied, but it was animated and energetic in the extreme. We crossed each other several times. He called Napoleon the weakest, littlest man in history; whereas you know my opinion to the contrary. He considers Shakespeare and Washington the two greatest men that ever lived, and Cromwell one of the greatest sovereigns. Conversation turned upon Washington, and I was asked why he was still suffered to rest in the humble tomb of Mt. Vernon. I mentioned the resolution of Congress to remove his body to the Capitol, and the refusal to allow it to be done on the part of his legal representatives. In making this statement, I spoke of the ashes of Washington, saying, that his ashes still reposed at Mt. Vernon. Landor at once broke upon me, with something like fierceness. 'Why will you, Mr. Sumner, who speak with such force and correctness, employ a word which, in the present connection, is not English? Washington's body was never burnt; there are no ashes—say, rather, remains.'"

IN Atlay's Victorian Chancellors, one of the most interesting books on law and lawyers which has been published for many a year, there is the story of Brougham and Scarlett, which has been told of more than one successful advocate.

Of the art of managing a jury Brougham knew nothing. If one of the twelve seemed inattentive he would stop, and, looking at the culprit, would protest that it was useless for him to proceed. Of the exquisite dexterity of Scarlett he had not the smallest trace. 'What do you think of the counsellors on the circuit?' a North-country jurymen was once asked at the end of a long assize. 'Why, there's not a man in England can touch that Mr. Brougham.' 'But you gave all the verdicts to Mr. Scarlett?' 'Why, of course, he gets all the easy cases.' And Mr. Atlay gives this picture of Lyndhurst, the English Lord Chancellor, who was born in the United States: On the bench his lips would often be seen to move, but no sound proceeding from them would be heard by the bar. The associate sitting beneath him could tell another tale; the classic instance is that of General Watson, who was arguing before him. 'What a d——d fool the man is!'—then an interval, 'Eh, not such a d——d fool as I thought;' then another interval. 'Egad, it is I that was the d——d fool.' Like most judges he was especially tolerant to the litigant in person. Mr. Cleave, on being tried in his court, began his speech by remarking that before he sat down he should, he feared, give an awkward illustration of the truth of the old adage that he who acts as his own counsel has a fool for his client. 'Oh, Mr. Cleave,' said the Lord Chancellor, 'don't you mind that adage, it was framed by the lawyers!'

THE most historical, says Atlay, of his (Lord Lyndhurst's) judgments was delivered on the writ of error to the House of Lords to quash the indictment on which Daniel O'Connell had been convicted at Dublin. On September 4, 1844, Lyndhurst, fortified by a great majority of the English judges, below, moved that the conviction be affirmed, delivering his speech, as usual, without any reference to notes. Brougham followed on the same side, but Denman, Cottenham, and Campbell, a majority of the five law lords were for reversal. The battle was not over, however. The Tory peers were thirsting for the blood of the arch repealer, and when the question was put from the Woolsack that the judgment of the court below be reversed, a number of voices not belonging to the law lords cried, "Not content." It was a grave crisis; the character of the supreme tribunal for impartiality, indeed its very existence as a court, was at stake. The distinction between law lords and lay lords was theoretically unknown to the House of Lords; there was nothing to prevent any member taking part in its judicial proceedings, and there were cases of compara-

tively recent date in which lay lords had exercised the right of dividing on the hearing of appeals. But if these admitted exceptions were to be followed, the authority of the House of Lords as a court of justice and as the fountain of precedent would not only be impaired but ruined. Lord Wharncliffe, the president of the council, implored his brother peers not to break through the honorable tradition; he was followed by Brougham and Campbell. And, last of all, Lyndhurst, whose influence in the assembly was of a different order from that exercised by his learned brethren, threw his weight into the scale. "I think," he said, "these noble lords who have not heard the arguments will decline voting if I put the question again." And the noble lords accordingly withdrew.

IN Edwards' book already referred to, this excellent incident is found: Judge Daniel Cady, while a justice of the Supreme Court of New York, was holding a circuit in one of the northern counties. A cause came on for trial which involved the title to lands and required proof of old landmarks and boundaries. It was necessary, therefore, for the parties to call as witnesses some of the oldest residents. Among other witnesses, an old gentleman by the name of Wood was called and gave testimony in a clear, intelligent and satisfactory manner. At the close of his evidence, Judge Cady said he would like to ask him a few questions if he were willing. Wood said "Certainly."

"How old are you?"

"I am seventy-nine years of age."

"May I ask you what have been your habits through life?"

"My habits have been very regular. I have been very temperate. I don't think I could tell the different kinds of liquor by their taste, for I never drink intoxicating liquors. I have been in the habit of retiring early at night and rising by daylight in the morning."

The judge, who was noted for his temperate views, took occasion to deliver a short lecture to those in attendance on the blessings arising from habits of industry, method and especially of temperance. "You see this man," observed his honor, "at quite an advanced age, in possession of all his faculties, in good health and you have heard the clear and intelligent manner in which he has given his testimony. Permit me to recommend him as an example which it might be well for many to follow."

The next witness called was also a Mr. Wood, a brother of the model temperance man; and who also gave his testimony in a clear and intelligent manner. At its close, Judge Cady also said to him: "If you have no objection, Mr. Wood, I should like to ask you questions similar to those I put to your brother."

"Certainly."

"How old are you, Mr. Wood?"

"I am seventy-seven years of age."

"What have been your habits through life?"

"Well, judge, I can't say, as my brother has, that I have been regular in my habits or temperate. To tell the truth, judge, I have hardly seen a sober day or been to bed sober since I was a boy. I have been a hard drinker all through life."

"Well," exclaimed the judge impatiently, "I don't see as it makes any difference with this Wood whether it is wet or dry!"

IN the Bench and Bar of Saratoga County, by E. R. Mann, attorney-at-law, there is this striking story of the vengeance of a railroad. John Talmadge was a farmer in Malta on the line of the Rensselaer and Saratoga Railroad. His cattle wandered on the track through the fences, which neither party would repair, and were killed by the locomotive. He brought suit and recovered judgments for their value. This led to acrimonious disputes between him and Leonard R. Sargent, superintendent, and Asher Young, trackmaster of the railroad. Such was the state of affairs, when on the morning of May 22, 1849, a locomotive attached to a northern bound train ran off the track at Talmadge's crossing. The engineer, named Dodge, sustained injuries to his head, which caused his death. The cause of the accident was at once attributed to the owner of the farm by one Joseph Phayre, a former laborer for Talmadge, but who had been discharged by him. He told Young that Talmadge had threatened to run the cars off the track. On his oath, Talmadge was indicted for the murder of Dodge, August, 1849, and brought to trial the following December before Hon. William B. Wright, Justice of the Supreme Court. As great an array of legal talent as was ever gathered in a courthouse to conduct a trial, when the momentous issue of life and death was pending, appeared before the judge. After an exhausting search a jury was impaneled. The important witness was one Balfrey, who testified that he had landed in Quebec on a certain day and was on his way to Troy in search of work. On the twenty-second day of May, 1849, he was walking on the railroad near Talmadge's crossing, and feeling tired, had sat down in a clump of bushes to rest. While there he saw Talmadge drive a stone into the space allotted for the flange of the wheel between the rail and the planks in the crossing. Before he could give the alarm the accident happened. This made a direct case for the state, it being supplemented by the testimony of Phayre, that he saw Balfrey on the track near the east line on the day in question. But George G. Scott, the leader for the defense had been indefatigable in his efforts to save Talmadge from his accusers. During the time that had elapsed after the sitting of the grand jury, he had been to Quebec, and ascertained at the quarantine that no such person as Balfrey had landed there at the time specified. He went then to New York and found that a

man of his personal appearance had landed at Castle Garden three days after the accident. He traced him to Albany, and there found him in communication with Phayre. He had the evidence in court to establish that this was one of the most glaring attempts to secure a judicial murder by perjury that every disgraced a calendar. As soon as the people's counsel became convinced of this during the cross-examination of Phayre, they refused to be parties to the infamous outrage on a citizen of hitherto unblemished reputation. The following is the entry on the minutes: "The counsel for the people having abandoned the prosecution, the jury under the charge of the court, without retiring, say that they find the prisoner not guilty." This was done amid the plaudits of the large audience. The district attorney immediately ordered the arrest of the perjurer Balfrey, alias Parker, and Phayre. They were indicted in February, and at the October Oyer, 1850, Parker pleaded guilty and acknowledged that he was suborned by Phayre and Asher Young. Phayre pleaded not guilty, but was convicted. They were each sentenced to ten years. Young, fearing a trial and conviction for subornation of perjury on the confession of Balfrey, committed suicide by getting on a hand-car and running it in front of an approaching train. He was struck and killed instantly. Dodge, the dying engineer, stated that the accident was owing to the speed at which he was running the engine at the time, causing it to bound on the track. Mr. Talmadge was nearly ruined, financially, by this dastardly attempt on his life, but subsequently became a prosperous manufacturer of chemicals in the City of New York.

IN *Trials and Sketches*, by O. M. Smith, published in Cincinnati, in 1858, there is an interesting description of Indiana in the early days and how—as is the rule in a new country—technicality in legal practice foiled so often the efforts of the people to punish the criminals who congregated there. The criminal law describing crimes and prescribing punishments, was strictly construed, and the forms of Chitty with the statutory definitions adhered to, far beyond the requirements of justice. On one occasion the author had indicted a man for stealing a horse and the evidence proved the animal to have been a gelding. The variance was held fatal on the trial. In another case the indictment charged the stealing of a hog, and the evidence proved that the animal was dead and dressed, hanging upon the hook. The court held that the variance must defeat a conviction, as it was "pork" and should have been so laid, and not a "hog." Then there came up for trial a prosecution against a man for stealing a turkey of the value of one dollar. The proof was that the bird was dressed, hanging up in the smokehouse of the prosecutor. The judge ruled that the variance was fatal on the ground that it was "fowl" and the prisoner was acquitted.

Finally a judge was found who refused to be bound by such legal nonsense. The country was filled with Indians, friendly and hostile, when a gang of desperate horse-thieves from Kentucky, Ohio, Pennsylvania and Virginia, began to cross the river and steal and drive away the horses of the white men and Indians, indiscriminately. Governor Harrison was waited upon, and consulted. The settlers were for lynch law and hanging, or at least whipping; but the opinion of the Governor that the laws should be enforced upon the offenders prevailed, and many thieves were taken and confined, ready for the sitting of the court. At the next term, trial after trial, with conviction after conviction, were had, but the attorney for the United States was a young, green lawyer, and every conviction was followed with successful motions in arrest of judgment for some defect in the indictments. The decisions gave neither protection nor satisfaction to the people. The clamor against the court reached the ears of the judge, and he resigned, when Gen. Marston G. Clark, a cousin of Gen. George Rogers Clark, and afterward agent for the Kansas Indians, was by consent appointed judge to fill the vacancy on the bench. The General was no lawyer—was raised in the woods of Kentucky, where there were no schoolhouses; could scarcely read a chapter in the Bible, and wrote his name as large as John Hancock's in the Declaration of Independence. He was about six feet in his stockings, of a very muscular appearance—wore a hunting shirt, leather pants, moccasins and a fox-skin cap, with a long cue down his back. The court came on; Judge Clark on the bench. The jail was full of horse-thieves. The penalty was not less than thirty-nine lashes on the bare back. The grand jury returned indictments against each of the prisoners. Judge Clark—"We will try John Long first, as he seems to be a leader in this business. Bring him into court." Sheriff—"There he sits; I brought him with me." "John Long stand up. You are indicted for stealing an Indian pony; guilty or not guilty?" Counsel—"May it please the Court, we plead in abatement that his name is John H. Long." "That makes no difference. I know the man, and that is sufficient." "We then move to quash the indictment before he pleads in chief." "State your objections." "First, there is no value of the horse laid; second, it is charged in the indictment to be a horse, when he is a gelding." "I know an Indian pony is worth ten dollars; and I shall consider that a gelding is a horse; motion overruled." Plea of not guilty; jury impanelled; evidence heard; proof positive; verdict guilty; thirty-nine lashes on his bare back. Counsel—"We move in arrest of judgment on the ground that it is not charged in the indictment that the horse was stolen in the Territory of Indiana." "That I consider a more serious objection than any you have made yet. I will consider it until morning. Sheriff, adjourn the court, and keep the prisoner safe till the court meets." The judge kept his seat until the

sheriff returned from the jail. "Sheriff, at 12 o'clock tonight you and your deputy take Long into the woods, clear out of hearing, and give him thirty-nine lashes on his bare back, well laid on, put him in jail again; say nothing, but bring him into court in the morning." The order was obeyed to the very letter and next morning Long was on hand when court opened, his counsel ignorant of what had taken place. Judge Clark—"I have been thinking of the motion in arrest in the case of Long; I have some doubts, as the evidence proved that he did steal the horse in this territory, and I think I ought not to sustain a motion that I understand will discharge the prisoner after he has been found guilty by the jury; but I feel bound to grant a new trial." Long, springing to his feet, "Oh no, for heaven's sake; I am whipped almost to death already! I discharge my attorneys and withdraw their motion. Judge Clark—"Clerk, enter the judgment on the verdict, and mark it satisfied." The other prisoners were brought up in succession, and convicted. No motion to quash, or in arrest, was afterward made. The prisoners were whipped and discharged, carrying with them the news to all their comrades. Not a horse was stolen in the territory for years afterwards.

The author of this sketch had a case on the civil side of an Indiana court. He was for the defendant. It was proved that his client had promised by parol to pay a debt another person owed the plaintiff. "The evidence closed, I thought I had him, and took up the statute and read to the associate judges from the chapter on frauds and perjuries: 'No action shall be brought to charge any person upon any promise to answer for the debt, default or miscarriage of another, unless the promise is in writing, signed by the party to be charged.' This I supposed settled the case, but not so. Plaintiff's counsel—Hand me that book. If the court please, that law is void under the Constitution of the United States, which reads: 'No state shall pass any law impairing the obligation of contracts.' I saw I was gone. The Court—The Constitution of the United States must prevail; judgment for the plaintiff."

COCKBURN'S Circuit Journeys show how they sometimes got rid of these things in Scotland even in the old days. "An accident occurred at Ayr worth being recorded for the edification of the idolaters of form. A few hours before the court was to open, the clerk came to me with his hair on end, and announced that, by some blunder, none of the proper technical papers had arrived from Edinburgh. There were no original indictments, declarations, or productions, no executions, consequently no evidence that any accused, or juryman, or prisoner, had been cited to attend—no anything. I bade him hold his tongue, and proceed as if everything was right, and explained to all the counsel who

were present for prisoners what had happened, and that their objecting could only end in the trials being put off, and their clients suffering longer imprisonment. In this state we proceeded to business. What communication took place between them and the prisoners I do not know, but everything went on as usual. Jurors and witnesses attended and acted, copies were read instead of originals, and nobody could have suspected that there was any flaw. No circuit could proceed more quietly, or more effectively; nor was any attempt ever made to raise any doubt afterwards. A valuable precedent against nonsense."

THERE is poetry as well as prose in the DOCKET's book. Do many lawyers know that Daniel Webster sometimes courted the muse; and is there anything more sincere and touching than these five verses to his dead son?

The staff on which my years should lean
Is broken ere those years come o'er me;
My funeral rites thou shouldst have seen
But thou art in the tomb before me.

Thou rearest to me no filial stone,
No parent's grave with tears beholdest;
Thou art my ancestor, my son,
And standst in heaven's account the oldest.

On earth my lot was soonest cast
Thy generation after mine,
Thou hast thy predecessor past,
Earlier eternity is thine.

I should have set before thine eyes
The road to heaven and showed it clear
But thou untaught springst to the skies
And leav'st thy teacher lingering here.

Sweet seraph, I would learn of thee,
And hasten to partake thy bliss!
And oh! to thy world welcome me
As first I welcomed thee to this.

AND in the DOCKET's book there is this quaint stanza, which is taken from the Life of Lord Chancellor Campbell. It was written three hundred years earlier by his great predecessor, Sir Thomas More, and says Campbell "ought to make me thankful and cheerful in the contemplation of my large share of the good things of life."

Some manne hath goods but children hath he none.
Some manne hath bothe, but he can get no healthe;
Some hath all three, but up to Honor's throne
Can he not creep by no manner of stealthe.
To some she sendeth children, riches, healthe.
Honor, worship, and reverence all his life,
But yet she pincheth him with a shrewish wife.
Be content,
With such reward as fortune hath you sent.

BOOK REVIEWS.

THE COMPARATIVE LAW OF MARRIAGE AND DIVORCE.—Under the general editorship of ALEXANDER WOOD BENTON, of Gray's Inn, Barrister-at-Law, Puisne Justice of the Supreme Court of Ceylon, formerly Judge of the Supreme Court of Mauritius and George Grenville Phillimore, B. C. L., of the Middle Temple, Barrister-at-Law. Reprinted from Burge's Commentaries on Colonial and Foreign Laws. London: Sweet & Maxwell: Stevens & Sons. 1910.

This work forms the third volume of the second edition of Burge's Commentaries on Colonial and Foreign Law, which deals with the laws of marriage and divorce in the principal legal systems of the world. Those systems include the Roman civil law, the canon law, the Roman Dutch law, the ancient and modern French law, such typical modern systems as the codes of Belgium, Italy, Spain, Germany, Austria, Hungary, and Switzerland; the laws of the British Dominions and the United States, and such Oriental systems as the Hindu and Mohammadan laws in British India, the Buddhist law in Burmah, the laws of China, Japan, Siam; and the rules of private international law. As regards the British Dominions the common law is the main foundation of the law in the Colonies settled by Great Britain; the Roman civil law is the basis of the law of France which still survives in the possessions originally French, such as the Coutume of Paris in Quebec and St. Lucia, the Coutume of Normandy in the Channel Islands, and the code civil in Mauritius; the Roman-Dutch law continues in force in the Union of South Africa, Ceylon and British Guiana; the law of Spain (now to a very limited extent) in Trinidad; the Ottoman law in Cyprus; and the Italian law has been largely adopted in Malta.

This summary of the legal systems of the civilized world is taken from the preface to this volume. Burge's Commentaries were first published in 1838 and soon became well known on both sides of the Atlantic. Its author, a member of the English bar, spent twenty years in Jamaica for twelve of which he was Attorney General. On his return to England in 1829 he acted as agent of that island and practiced before the Privy Council; he was a member of Parliament in 1831 and seems to have been often employed in cases before the English Privy Council representing one side or the other in colonial appeals. A second edition of the Commentaries is now in course of publication under the editorship of the two authors of this work on Marriage and Divorce, Messrs. Renton and Phillimore, with assistant editors in Canada, India, Holland, Australia, France, Germany, Switzerland, the United States, and other countries. Only two volumes have been so far published, or at least this is as far as the work has been seen in the United States though it is announced to extend to at least five volumes.

This volume therefore is the third volume of Burge's Commentaries, but just why it is issued in this form it is difficult to guess. Perhaps the

real reason is that the subject of marriage and divorce is one which is now occupying the attention of jurists the world over, and is a subject of much discussion whenever lawyers from other countries get together. Not only the causes for divorce but the procedure and the effect of decrees in other countries are being thoughtfully discussed by the statesmen and lawyers of the different nations; therefore, to have in one volume distinct from the Commentaries the comparative law of marriage and divorce is no doubt the reason for the form which this volume takes.

The book is of course not the work alone, as we have said, of the general editors, and that the special laws have been stated by men specially learned in the jurisprudence of their particular country and under a general editorship, raises a presumption that the work is authoritative and free from error. The volume contains over 600 pages, is beautifully printed on the best book paper and is well indexed. It will certainly long remain a valuable hand-book for the study of the laws concerning marriage and divorce of the civilized world.

AN INDEX DIGEST OF DECISIONS UNDER THE FEDERAL SAFETY APPLIANCE ACTS.
—Washington: Government Printing Office. 1910.

A book like this most certainly gives a sense of doubt and perplexity to the advocate of the codification of all our laws. Here is a Federal statute on a very limited subject—Safety Appliances on Railroad Cars. It really came into force less than a dozen years ago and now we have an index digest of 300 pages to put the inquirer on the track of judicial decisions concerning a few pages of statute law. But, as pointed out by the Interstate Commerce Commission, probably in no other line of cases has the character of interstate commerce been so thoroughly considered, and an examination of this volume will indicate the limits to which the courts have gone in the application of Federal power under the commerce clause of the Constitution.

THE AMERICAN STATE REPORTS.—Containing the cases of general value and authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several states. Selected, reported and annotated by A. C. FREEMAN. Vols. 135-136. San Francisco: Bancroft-Whitney. 1911.

The 135th volume of this well known series of American State Law embraces 23 volumes from 19 states. The monographic notes are on the subjects of Abandonment and Adverse Possession; Bankruptcy and New Promises to Pay; Writ of Possession; Fire Insurance and the Mortgage Clause; Jeopardy Provision of the Constitution; Judicial Sales; Removal of Causes Robbery, and Specific Performance.

The notes in Vol. 136 are unusually interesting and valuable. The principal ones are upon Account Stated; Ejectment by an Executor or Administrator; Admissibility of Evidence Wrongfully Obtained; The Duty of Warehousemen in the Care of Property; the Limitation of Actions on Obligations Made on or After Demand; the Creation and Conveyance of Easements Appurtenant; Who May Not Purchase at Judicial

Sales; the Right of Officers of a Corporation to Compensation; the Duty of a Corporation to Transfer Stock on Its Books. An excellent example of the exhaustive character of these notes is found in the one to *Chesapeake R. Co. v. Austin*, 137 Ky. 611; which involved the question of the right of a passenger on a railway train to a seat. It is rather surprising to find how often this question has been litigated in the American courts and how in theory the carrier is obliged to give every passenger a seat which every traveler knows in practice is not done.

THE LAWS OF ENGLAND.—A complete statement of the whole law of England, by the Right Honourable The Earl of Halsbury, Lord High Chancellor of Great Britain, 1885-1886, 1886-1892 and 1895-1905, and other lawyers. Vol. XV. Philadelphia: Cromarty Law Book Co. 1910.

This volume (the former ones have been noticed in the Review from time to time) contains the English Law of Food and Drugs; Fraudulent and Voidable Conveyances; Friendly Societies; Game; Gaming and Wagering; Gas; Gifts and Guarantee.

INTRODUCTION TO THE SCIENCE OF LAW:—SYSTEMATIC SURVEY OF THE LAW AND PRINCIPLES OF LEGAL STUDY. By KARL GAREIS, Professor of Law at Munich. Translated from the third revised edition of the German by ALBERT KOCUBEK, Lecturer on Jurisprudence in Northwestern University. With an introduction by ROSCOE POUND, Story Professor of Law in Harvard University. Boston Book Co., Boston. 1910.

This work was first published in 1887, the present translation being from the third edition of the German, is a small encyclopedia of jurisprudence. Its aim is to develop a theory of fundamental principles of legal science and to arrange and classify the main heads of German law in accordance with an application and development of that theory. The first part will be of most interest to the American lawyer and student as the second part is confined to an analysis of the German law. The American preface is written by Prof. Roscoe Pound and we cannot do better than quote from this to show the scope and variety of the work. Prof. Pound says:

"In England and America we have as yet no sociological jurisprudence and no modern philosophical jurisprudence. The ground is divided between the analytical and historical schools, the balance inclining toward the former in England, where the supremacy of Parliament gives manifest verity to the analytical view of law in the every-day experience of lawyers, the latter in America, where the judicial power with respect to legislation makes such a view difficult, if not impossible. England has no philosophical jurist literature at all, unless it be the utilitarian natural law of Austin's lectures II, III and IV, and the modified Hegelianism of T. H. Green's "Principles of Political Obligation." In America we have not a little eighteenth century natural law in elementary books founded upon Blackstone. Otherwise, there is only the naive natural law of the practitioner, who thinks of an ideal development of the principles of the common law as the legal order of the universe, or the natural law of the historical jurist, who has been convicted more than once of what Borgbohm calls, "anonymous natural law;" i. e., a notion—subconscious it

may be—that the principles he discovers through historical research have necessary and absolute validity so that the law may develop, but cannot reject or dispense with them. Anglo-Americans gave one more proof of the instinctive sound sense which is a race characteristic, when they refused to have anything to do with the metaphysical jurisprudence of the nineteenth century which professed to set up a science of law by deduction from a few first principles. Perhaps they show an obstinate conservatism which is no less characteristic of their legal thought when they continue to identify all philosophical method in legal science with the universally discredited *Naturrecht*. Certainly there is good warrant for believing that lack of philosophical method in our legal science is more than merely coincident with our want of a sociological jurisprudence. Without a philosophy of law, the historical and analytical methods will not lead thereto. The ground sought to be covered in English by the text-book on jurisprudence, which is primarily analytical but usually endeavors to make concessions to the historical school, is occupied in Germany by three types of book: Treatises on the philosophy of law, of which a notable one by the greatest living exponent of the subject appeared last year (Kohler, *Lehrbuch der Rechtsphilosophie*, 1909) jurist surveys (*Enzyklopadie*) and text-books of the general theory of law. The first take up the philosophical foundations of the legal order, legal systems, institutions and doctrines, and the philosophical and ethical bases of particular branches of the law. The second aim rather at a systematic review of the law as a whole, employing all three of the methods of jurisprudence, but chiefly the philosophical and the historical. The third treat of the conception of law and the leading general conception of a legal system chiefly from the analytical standpoint, but not neglecting the other two. Application of the analytical method to the details of the legal system is left to the general part of treatises on the *Pandects* or treatises upon the Civil Law. An excellent example of the third type of book is Sternberg's *Allgemeine Rechtslehre* (1904). One of the best of the class, although not German, has been made available in English through Judge Hasting's translation of Korkunov's *General Theory of Law*. Some of the better examples of the first are likely to be put into English soon through the initiative of the Association of American Law Schools."

THE LAW APPLIED TO MOTOR VEHICLES WITH A COLLECTION OF ALL THE REPORTED CASES. BY CHARLES J. BABBITT, of the Massachusetts Bar, author of "Index-Digest of Massachusetts Motor Vehicle Law." With an Introduction by FRANCIS HURTUBIS, JR., of the Massachusetts Bar. Washington, D. C. John Byrne & Company. 1911.

How great a place the motor car has taken in our every-day life is most forcibly illustrated by the appearance of this large volume of over 1200 pages. The author says that when he first showed his manuscript to a member of the Massachusetts bar, he was asked, where did you get the material for your book, I thought all the law relating to motor vehicles was to be found in the half-dozen pages of legislative acts. But he points out that the law governing motor vehicles is found not so much

in the laws of the legislatures but in the storehouse of the English Common Law. It is the application of the old rules to new conditions that forms the principal part of this work, for really every case which has involved the modern motor car has been decided in the last ten years. The work is divided into four parts, as follows: I. Principles of Jurisprudence Applying to Motor Vehicles and The Duties Imposed by Law. II. The Law of Negligence Applied to Motor Vehicles. III. Statutes Declaring the "Law of the Road," Definitions of Words and Terms Used to Express Places Set Apart for Travel; Suggestions for Street Traffic Regulations; General Laws Regarding Speed; Schedule of States Having Speed Laws. IV. Collection of Motor Vehicle Cases. Such a complete work as this is must be consulted by every lawyer who has anything to do with a case involving the rights or liabilities of motor car owners.

THE LAW OF CIVIL LIABILITY FOR PERSONAL INJURIES BY NEGLIGENCE IN TEXAS. By ROBT. G. STREET, District Judge, Galveston, Texas. Chicago: T. H. Flood & Company. 1911.

This is a work of a local character but close examination shows us that it is well and carefully written, and to the Texas lawyer who has a personal injury case to attend to, it will be invaluable, and the lawyer outside that state may find much of value and interest on the subject treated.

THE COMMERCIAL CODE OF JAPAN. By YANG YIN HANG, Graduate in Law of the Waseda University, Tokyo, Japan; Master of Law, University of Pennsylvania. Boston: Boston Book Co. 1910.

This is number one of the law school series of the University of Pennsylvania. The second number, Mr. Lloyd's work on "The Early Courts in Pennsylvania" was reviewed in our last number. The author, Mr. Yang Yin Hang, is a native of China and a graduate of the Waseda University of Tokyo, Japan. After acquiring a thorough familiarity with English he spent two years as a graduate student at the University of Pennsylvania, receiving last June the degree of Master of Laws. While in residence at the university he made himself familiar with our commercial law, and wrote and annotated this translation. The object which he seeks to accomplish is not merely to render accessible to English-speaking students the knowledge of commercial law of Japan, but also to increase our knowledge of and interest in the commercial codes of the civil law. The Commercial Code of Japan is based mainly on the Commercial Code of Germany. At the same time it contains elements from the commercial codes of practically all Continental countries, and some administrative provisions due to Japanese conditions. The mere translation of the text of a code drawn by civilians, however useful to one who has already read widely in the civil law, is of little use to a person trained only in the American and English law, unless the notes are so arranged as to answer, in part at least, the numerous questions which necessarily occur to him. One class of the notes, therefore, accompanying this translation, is designed to answer the more important

of these questions. Further, carrying out the thought that one object of the present work is to increase our knowledge of the commercial codes of the civil law generally, Mr. Yang has written an historical introduction designed to give an outline, not only of the history of the creation of the Japanese Commercial Code, but a concise statement of the history and sources of the present commercial law of Continental Europe. With the same object in view he has also placed in the notes information in regard to analagous provisions in European codes. Finally, as the Japanese code itself is avowedly based mainly on the German Commercial Code, where differences exist which may interest the student of comparative law the exact provisions of the German Code are given in full in the notes.

PUBLICATIONS OF THE SELDEN SOCIETY, Vol. 24; YEAR BOOKS OF EDWARD II, Vol. V; EYRE OF KENT, 6 and 7; EDWARD II, A. D. 1313-1314, Vol. I. Edited by the late FREDERICK WILLIAM MAITLAND, Downing Professor of the Laws of England, Cambridge, of Lincoln's Inn, Barrister-at-Law; the late LEVESON WILLIAM VERNON HARCOURT, of Gray's Inn, Barrister-at-Law, and WILLIAM CRADDOCK BOLLAND, of Lincoln's Inn, and the North Eastern Circuit, Barrister-at-Law. London. Bernard Quaritch. 1910.

An Eyre in English mediaeval law was a court of specially commissioned royal justices sent on circuit or *in itinere*, that is to say they were justices itinerant or "in eyre" and the prototype of the later circuit system. As representatives of the crown and connecting links between the local and central courts and administration the Justices in Eyre had great powers. Their commission entitled them "*tenere omnia placita*" and comprehended all judicial commissions. In particular they were to act upon all pleas from local juries and assizes; pleas of the Crown; and make gaol delivery. All this judicial business, however, was more a means to an end than an end itself. The great object of an Eyre seems to have been the levying of as many fines as possible and the articles of the Eyre, or directions as to what was to be looked into, gave opportunity "for extracting an amercement from somebody, or driving some one to make fine with the King." Little wonder that the coming of the Justices in Eyre was looked upon as a visitation not to be endured oftener than once in seven years or that when, in 1233, the justices itinerant were sent to Cornwall the people fled to the woods in fear of them. The great thirteenth century chronicler, Matthew Paris, knew whereof he was writing when referring to the justices, he says: "Under pretense of justice they collect wealth without end for the needs of the king."

The Selden Society has done well to undertake the publication in two volumes of the great Eyre of Kent of 6 and 7 Edward II (1213-1214), as volume V of the series of Year Books of Edward II. The lack of a comprehensive Eyre report for Edward II's reign was noted in connection with the published year books but no means of supplying this lack was apparent until the discovery by Professor Maitland, in the University Library at Cambridge, of a manuscript of the present document. After Professor Maitland's death a rough transcript which he had made of the

record came into the hands of the society and it was decided by the council to have it edited, translated, and published as one of the Year Books Series. The difficult work of editing and translating was entrusted to a scholarly barrister, Mr. Leveson William Vernon Harcourt, who brought to light fifteen additional manuscripts of the Eyre, most of which were better than the original manuscript discovered by Professor Maitland. Mr. Harcourt collated these different versions and prepared a portion of the revised text during 1908 and the spring of 1909, but his sudden death made it necessary to secure another editor. In this difficult task the society was fortunate in obtaining the scholarly services of another barrister. Mr. William Craddock Bolland of Lincoln's Inn. Continuing the work of Mr. Harcourt in collating various sources of information, making a further revision of the text, translating the record into English, compiling a calendar of jurors and bailiffs and indexes of matters and of names, and, last but not least, writing a learned and interesting introduction to Vol. I of over one hundred pages, Mr. Bolland has shown remarkable industry and ability as an editor and translator of a great legal record.

Beginning on the first day of July of 1213 and lasting, with one intermission, for a whole year it would seem as if this Eyre were the longest ever holden in mediaeval England. The business transacted was enormous because of the fact that no Justices in Eyre had sat in Kent for twenty years and pleas of all kinds had accumulated. Thus a great variety of information is offered to the student of English legal institutions and much additional light is cast on methods of procedure and punishment. The first volume of the Eyre, with which we are now concerned, contains the preliminary proceedings of the court, pleas of the Crown, actions of attainr, and actions of trespass, in addition to the introduction and critical material already referred to. The purely civil actions are to appear in a subsequent volume which will be eagerly looked for.

Canterbury was a crowded city at the opening of the Eyre for in accordance with the King's writ the sheriff of Kent had summoned thither "archbishops, bishops, abbots, priors, earls, barons, knights and all freeholders of your county, and also from every villa four law-worthy men and the reeve, and twelve law-worthy men from every borough throughout the whole of your bailiwick, as well as all others who are wont and bounden to give their attendance before the justices in Eyre." This meant a great concourse of people for the sessions of the court and it was in the hearing of all these that on Sunday the octave of the Nativity of St. John the Baptist (July 1st) of 1213, Sir Hervey de Staunton, the chief of the justices, caused the royal commission of appointment of Justices in Eyre to be read. The sheriff of Kent was then called on to produce his writ of summons, which he did. Next the chief justice commanded the sheriff to surrender his wand of office which having done he was "charged in the name of the King that well and faithfully he should acquit himself of all things that belonged to his office; preserving secret as well the counsel of the King of their own, and due obedi-

ence giving to their commands during the Eyre, God helping him." His wand was then returned to him and his clerks or deputies were charged and sworn in like manner. Also inquiry was made as to all sheriffs and coroners in the county of Kent since the last Eyre and whether they or, in case of death, their heirs and executors were present at court. The previous sheriffs since 20 Edward I (1292-1293) were all present or represented. Some, however, could not produce their rolls seemingly and were put in the sheriff's custody and their lands seized into the King's hand. They were to produce their rolls the next day if possible. Heirs who could not produce rolls were to have both lands and chattels seized by the sheriff. The same procedure was followed in regard to the coroners of the county and their heirs and executors. Any such that did not appear when called were to be arrested by the sheriff, their lands and tenements seized, and their wives and children ousted. The county was to be responsible for any coroners who possessed neither lands, tenements, nor heirs, seeing that the county had chosen such at its peril. Some injustice was likely to result in the case of such stringent regulations as would appear from the following passage from the Eyre: "And upon this the guardian of an infant within age that was the heir of a coroner alleged that the rolls of the infant's father were in the possession of a certain woman that was his executrix; and so, she not being then present, command was given to the sheriff to seize her lands and chattels and arrest her person, and bring her up the next day to deliver the rolls. It was said, however, by the serjeants that this distress was not rightly ordered, seeing that she had had no day assigned by public proclamation for her appearance before the justices." The rolls of the sheriffs and coroners having been produced and examined the justices had them sealed and returned to their owners. There also appeared those who held by barony, *per baroniam*, and asked to have their attendance recorded in view of the summons. Among these barons was the great Earl of Oxford who, the record says, "came and made his general attorney by bill and was received. But the justices said that this was of grace."

The next step in the preliminary proceedings was that the justices made four cries or proclamations. The first of these forbade the presence within twelve leagues of Canterbury of "all those who were attainted of conspiracies or of maintenance of false complaints in the last Eyre, or afterwards before Sir Roger Brabazon and his companion Justices of Trailbaston in the said county" during the continuance of the Eyre. Should such persons be parties to some plea they could present themselves to justices and be delivered and return the same day. The second proclamation was "that no market or fair should be held in the said county during the continuance of the Eyre, save only in the City of Canterbury." The third prohibited the holding of any court or county court during the Eyre save because of some plea of land under writ of right patent, or for appeals in the county court. The fourth forbade any to let houses in the city to persons who had come to attend the Eyre. The reason or unreason of these four proclamations is well ex-

plained in the introduction. That all of them were strictly enforced is open to question. The bailiffs and coroners of feudal franchises were next called on to present their rolls and were dealt with as others had been. All this seems to have taken place the first day, which must have been a busy one.

With the second day the important business of selecting juries for the hundreds and half hundreds of Kent began and continued with some interruptions for almost a week. The *Capitula Itineris* or Articles of the Eyre were then delivered to the dozens or juries of the hundreds and they were bidden to report on all matters contained therein. The net of the King's justice was long and close meshed and hard to escape from as these proceedings show. The presentments and the ensuing trials and punishments constitute a remarkable record of mediaeval crime. The Pleas of the Crown cover one hundred pages of the printed record and include over two hundred cases or an average of ten a year for the twenty years. Considering that a number of these presentments have to do with accidents and involve the "deodand" or instrument of death, which is forfeited to the crown, the extent of crime in Kent does not seem to have been so very great. Many of the crimes are most brutal, however, and many of the punishments equally so. As an interesting example of mediaeval crime the following entry might be cited:

"While Roger of Marshborough and Peter Maynard of Wincheslsea were quarrelling within the borough of Orlestone, the aforesaid R. struck that same Peter upon the head with a certain bow, and the said P. attempted to strike the said R.; and upon this came up one Reginald of Ashbourne and Hugh Adam, his arms-bearer; and this R. ordered the said Hugh to shoot the said P. In obedience to which order the said Hugh pierced P. with a certain barbed arrow, so that on the third day thereafter he, the said P., did die. And the aforesaid R. and H. did immediately flee; and the jurors suspected them, etc., so let them be exacted and outlawed. They had no chattels, neither was the borough responsible for them, seeing they were strangers."

That technical pleading was a part of mediaeval criminal law is seen in connection with a long and complicated case of appeal of felony by a certain Felicia to which the defendant's lawyer replies as follows:

"Sir . . . she speaks in her appeal of "ten feet from the steps." Now this is no certain laying of the place, for what she says might mean ten feet to the west or ten feet to the south or ten feet to the east; and by reason of this omission also we claim abatement of the appeal. And yet again, in alleging that Richard struck her husband on the head with a certain sword called a "brooch," she does not describe the matter of which the blade thereof was made, whether of iron or steel, etc.; by reason of which further omission we claim abatement. And then, once more, Sir, Felica says that Richard wounded her husband on the right side of his jaw. Now this is an uncertain and insufficient laying of the place of the wound. She ought to have said it was two inches or three inches from the brow or from the neck or from the right ear; and so for this omission also we claim abatement of the appeal."

The exceptions taken above would hardly command weight in a modern English trial for murder but would be of great moment in American

trials. Why should the American criminal procedure be mediaeval when the English have made theirs modern and rational?

Space forbids further citations of Crown Pleas, though many are of great interest and value. They are followed in the record by an important case of attain, which seems to have been decided less according to justice than in conformity with the King's wish that one of the parties obtain the verdict "according to law." A few pleas of trespass close the first volume of this interesting record of royal justice. The index is good but has one or two important omissions such as "sanctuary cases," several of which are recorded but not one is indexed under sanctuary. On the whole, however, Mr. Bolland's editing is so thorough and scholarly as to be above reproach and should be a model to American editors of legal records.

A CONCISE LAW DICTIONARY OF WORDS, PHRASES AND MAXIMS. By FREDERICK JESUP STIMSON. Revised edition by HARVEY CORTLANDT VOORHEES. Boston: Little, Brown & Company. 1911.

Thirty years have elapsed since the publication of Mr. Stimson's Law Glossary. Its usefulness to students of the law and especially to those who encounter phrases common in the older treatises and reports, will now be extended by this new edition, which contains some two thousand words and phrases not to be found in the earlier volume. The editor, Mr. Voorhees, a writer of good reputation, has wisely kept much of Mr. Stimson's style and arrangement.

The size of the volume is a saving grace in this day of bulky lexicons. The common phrases which the good English dictionaries define, are omitted. It is not intended to be a comprehensive cyclopedia of legal terms. The copious citations to be found in the recent dictionaries, have very properly been left out—only the more important definitions, subjects of possible controversy, are so fortified. A useful list of abbreviations in law books, is given, but it should not have been placed in the body of the work. The choice selection of phrases, the terse style of definition, and its freedom from bulkiness assure the volume a welcome place in every practitioner's library.

THE LAW OF FRAUDULENT CONVEYANCES. By MELVILLE MADISON BIGELOW. With editorial notes by KENT KNOWLTON. Boston: Little, Brown & Company. 1911.

The effect of recent legislation, particularly of the Bankruptcy Law, on fraudulent conveyances, has not left the principles governing them devoid of interest, though as it is said by the editor in his preface to this volume, the legislation has rendered "such discussion in a measure academic." After preparing his excellent treatise on estoppel, Dean Bigelow published two volumes on Fraud, the first dealing with Deceit, the second with Circumvention. This treatise on Fraudulent Conveyances grew out of the volume on Deceit, of which it is virtually a second edition. The original text is very largely preserved, but numerous additions have been made, and the whole has been rearranged. The annota-

tions are more copious and comprehensive, and have been brought to date. Frequent references are made to the Bankruptcy and Insolvency Laws, and an able discussion of their provisions as to fraudulent conveyances is given in the text.

"OBSCENE" LITERATURE AND CONSTITUTIONAL LAW. By THEODORE SCHROEDER. Privately printed. New York. 1911.

"Not Published to Sell, but for Missionary Work Among Leaders of Thought." This inscription on the leaflet accompanying this volume is sure to attract attention. In a day of commercialized law books, one approaches with favor an author whose interest is great enough to print a book privately for free distribution.

While the volume is addressed to judges and lawyers, it has plenty to interest the layman. Its thesis is the unconstitutionality of the present statutes against obscene literature—the establishment of which depends less on the application of principles of constitutional law than on a revolution in the fundamental conceptions of sex modesty. As a plea for sex education, the book's function is more social than legal. With those interested persons who are not so over-sated with respectability as to oppose efforts to reform false conventions in social relations, the book will find much favor.

In spite of its forcible expressions of clever ideas, the constitutional phases of the discussion are not altogether convincing. The contention that the constitutionality of laws directed against literature as obscene is "not only undecided but free from the embarrassment of even an adverse dictum" seems startling at first, but the argument supporting it inclines to conviction. It is more certain that at common law, no literature was branded "obscene." The unconstitutionality is then based on five contentions:

1. The federal laws are void because Congress in its control of the mails and of interstate commerce, has no expressed or implied power to determine what are mailable ideas, for both interstate and intrastate communication.

2. Such laws are void under the constitutional prohibition against the abridgment of freedom of speech and of the press.

3. They violate the constitutional guarantee of "due process of law" in the necessary uncertainty of their application, and in providing for judicially constructive crimes.

4. They violate the constitutional guarantee against *ex post facto* laws.

5. They violate the seventh amendment to the Constitution of the United States, making juries to be judges of the law.

The argument supporting these contentions is enforced with frequent italics—numerous cases are cited from the reports, and much time is spent in reviewing the history of the law on obscene literature. A reader of the book may not be convinced of the soundness of these legal contentions, but he will be impressed by the argument on the psychological phase of the subject, and inasmuch as it will arouse interest and direct thought, the mission of the author of the book will be partially achieved.

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All communications for the editor should be sent to

JOHN D. LAWSON,

14 South Broadway,

St. Louis, Mo.



AMERICAN LAWYER

J. Biol. Chem. 265:10125-10130 (1990)

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2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

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THE UNIVERSITY OF CHICAGO

The following persons, by their respective
 signatures, being of the County of Kent,
 do hereby certify that the above is a
 true and correct copy of the original
 of the said Statute inrolled in the
 High Court of the Exchequer (Mr. J.
 G. Smith) and the Under Sheriff (Mr. J.
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THE AMERICAN LAW REVIEW.

SEPTEMBER-OCTOBER, 1911.

A TRIAL FOR MURDER IN ENGLAND.

THE CRIME.

On March 18, 1910, John Innes Nisbet, aged 44, and a clerk in the employ of the Stobswood Colliery Company, took the train to the colliery, carrying with him, as it was his custom to do once a week, a bag containing the wages to be paid to the workmen. At a way station a railroad porter discovered his dead body under a seat of the railroad carriage. A number of bullet wounds were in his head, and everything indicated a brutal murder. No trace of the murderer was found, but several weeks later one John Alexander Dickman was arrested on suspicion. After a long examination before the magistrates, he was convicted for trial, and at the next assizes for Northumberland, held at the City of Newcastle-Upon-Tyne, he was indicted for the murder.

THE OPENING OF THE TRIAL.

The trial opened on July 4, 1910, before Lord Coleridge, one of the Justices of the Court of King's Bench. He took his seat on the bench at eleven o'clock, accompanied by the High Sheriff of Northumberland (the Hon. Chas. A. Parsons, C. B.), the Under Sheriff (Mr. E. G. Harvey), and the Sheriff of Newcastle (Mr. W. R. Armstrong). The

Crown was represented by Mr. E. Tindal Atkinson, K. C., and Mr. C. F. Lowenthal. For the prisoner there appeared Mr. Mitchell Innes, K. C., and Lord William Percy, instructed by Mr. Edward Clark, Solicitor.

The prisoner, John Alexander Dickman, was described in the calendar as a Secretary, 45 years of age, and of superior education. When his name was called, the prisoner entered the dock accompanied by two warders. Upon entering the dock he had a brief conversation with Mr. Edward Clark, his solicitor. Mrs. Dickman occupied a seat behind the dock.

The Clerk said:

John Alexander Dickman, the charge against you in this indictment is that on the 18th day of March, in the present year, you feloniously, wilfully, and of malice aforethought, did kill and murder John Innes Nisbet. Do you plead guilty or not guilty?

Prisoner (in a firm voice): Not guilty, my lord.

Before the case was opened the prisoner was provided with a seat in the dock. A warder sat on each side of him.

THE CROWN COUNSEL'S OPENING.

Mr. Tindal Atkinson, K. C., in opening the case for the Crown, in a speech of about one hour, told the jury that the murder in question was committed by some one in a third class compartment on a train that left Newcastle at 10:27 in the morning of Friday, March 18. The train arrived at Alnmouth at six minutes past 12. At Alnmouth the deceased was found by a porter who opened the carriage door, lying under one of the seats of the carriage, where he had, no doubt, been pushed by the murderer. There was no question that this man was murdered. He was found with five bullet wounds in his head. Four of the bullets had been recovered, and according to the evidence of the doctor, one of those bullet wounds was sufficient to have caused instant death. The question which the jury had to determine was a very solemn one indeed—whether prisoner was or was not the man who murdered the deceased. It was a case, as they would find out, entirely of circumstantial evidence. They would know that circumstantial evidence might be the weakest of all evidence upon which to convict a person of a crime. On the other hand, it might be the strongest possible testimony in bringing home a crime to a prisoner. He was quite sure that they would give the closest attention to the evidence. The case was a peculiar one, and one that would require their closest attention, as every single fact was important.

If they were satisfied after careful and due consideration of the evidence, that the prisoner was the person who committed this murder, he need hardly say that they would not shrink from giving their verdict accordingly.

He would tell them shortly the history of this case. The deceased man, John Innes Nesbit, was employed at the time of his death as a clerk and bookkeeper by the Stobswood Colliery Company. He was a married man, 44 years of age, and about 5 feet 4 inches in height. He was of slight build, and wore a moustache and also gold spectacles. His duty as clerk to this colliery company was, on every alternate Friday, to go from Newcastle to a place called Widdrington, which was on the railway line between Newcastle and Alnmouth. It was, he thought, the fourth station from Alnmouth, and was 23 miles from Newcastle. He usually went by the train that left Newcastle for Alnmouth at 10:27 a. m. On March 18 last he received a cheque from his employers on Lloyds Bank for the sum of £370 9s. 6d. He took with him to the bank a leather bag, which had a lock attached to it, in which to place and carry the money. He called at Lloyds Bank that morning, cashed the cheque, and received 231 sovereigns, 206 half-sovereigns, £35 9s. in silver, and 20s. 6d. in copper, making the total of £370 9s. 6d. The gold was contained in three canvas bags, the silver in paper bags, and the copper in brown paper parcels. It would be shown that the bags in use at the bank comprised bags marked "No. 1 Lambton," "Lloyds," and "North-Eastern Bank"; and it was important that they should bear that in mind, because subsequently they would hear that there was found on the prisoner a quantity of gold in a canvas bag that was marked "Lambton No. 1." With this money in his bag, the deceased man left the bank.

The next that was seen of him was seen by a man called Raven, who knew him well, and who knew the prisoner well by sight, and had seen him during many years. This man Raven was standing at the end of the passageway—he had no doubt he was speaking to a good many who knew Newcastle station well—leading from that part of the station used for the Tynemouth traffic to the broader part of the station. He was close to a gate numbered "No. 4." Looking up the passageway towards the Tyne-mouth part of the station there was "No. 4" gate on the right, and, going behind a cigar divan, there was another gate called "No. 5." Raven was standing at the end of that passageway, near No. 4 gate, and he would tell them that as he stood there he saw the deceased man and the prisoner—he had no doubt about the identity of the prisoner—walking together from the direction of the third-class refreshment room down the passageway. They passed him quite close, and he said that if it had not been that the prisoner was with the deceased, he would have spoken. Prisoner and deceased passed round into the No. 4 gate, which was then open, and proceeded behind the cigar divan, at which point he lost sight of them. That was their way to the No. 5 platform, at which was standing the 10:27 train, by which deceased proposed to leave Newcastle.

The 10:27 train from Newcastle consisted of an engine and four long carriages, bogey-wheel carriages. The first carriage consisted largely of

luggage accommodation, with some three third-class compartments. The next carriage consisted of a third-class compartment at each end, and a first-class compartment in the middle. The third carriage was composed entirely of third-class compartments, and the fourth of some third-class compartments and accommodation for luggage. These were the four vehicles composing the train. He believed there were two carriages standing at the end of the train that were not attached to the train and were not intended to be attached to it. As he had told them, Raven saw these two men together; proceeding undoubtedly towards the No. 5 platform. This was a few minutes before the train started. The next thing was seen by a man named Hepple, who was a passenger on the train, and who was standing at the open door of a compartment of a carriage on the train. There was no doubt about the compartment, for he stated that there was in it a picture of Brancepeth Castle. It had since been ascertained that that was the only compartment in which there was a picture of Brancepeth Castle, and that that compartment was the third of the third carriage. He was standing there when he saw the prisoner, whom he knew well, walking with another man whom he did not know, but whom he described as a lightly-built man; and that they would hear was a fair general description of the deceased. He had his face to the train, and he saw the two men proceed to the head of the train. The last he saw of them was when one of them had his hand on the handle of the door of a compartment close to the head of the train. Hepple turned away and walked a little distance forward, and when he turned round again the men had disappeared. The next piece of evidence was that given by a man called Hall. Hall was in company with a man called Spink, and they were passengers by this train. They had selected their compartment and had got into it. The door was closed, but Hall had his head out of the window. That was the second compartment of the three third-class compartments of the first carriage. Hall had his head out of the window, and saw coming towards him two men. One he knew, and the other he did not know. The one he knew was the deceased. He knew him well, and was on speaking terms with him. He saw these two men go to the compartment which was next to his, farther from the engine. So Raven saw the two men practically coming to the end of No. 5 platform. A moment afterwards they had Hepple speaking to seeing the prisoner and another man, whose general description tallied with that of the deceased; and, almost at the time that Hepple was watching these two men going towards the head of the train, they had Hall speaking to seeing two men near the head of the train, one of whom he identified as the deceased. He (Counsel) ought to have mentioned that Hall—although he had not seen this other man before—picked the prisoner out from among other nine men who had been placed side by side in the police station. He picked prisoner out as the man who, in his opinion, was most like the man he saw. Now, they knew this was an all-important part of the case. If, after they had heard the other evidence, the jury were satisfied that it was the prisoner who was in company with the deceased, and who entered that compartment, they had gone a long way towards satisfying their minds that it was the prisoner, and no other person, who murdered Nisbet.

There was another piece of evidence. Two stations from Newcastle (Central) was Heaton Station, and there on the platform was the deceased man's wife. She was there purposely to see her husband—it might be for the purpose of getting his wages—but that he did not know. At any rate, she was there, and as the train drew up her husband came to the window of the compartment, put his head out, and spoke to his wife whilst the train was standing. The wife would say that, through the side window—the deceased having his head out of the middle portion—she saw another man at the further end of the compartment, sitting with his back to the engine. She only got a momentary glance at him, and she would say that the shadow of the archway in which the train was standing threw a shadow on his face. The man had his coat collar turned up, and she had very little opportunity of identifying him.

But an incident happened when the case was before the magistrates. Mrs. Nisbet had given her evidence; and after having given her evidence, she, from the position in which she was in court, caught a view in profile of this man, and then fainted. She would tell them that that was the view she got of this man's face in the carriage, and the resemblance was so marked, and gave her such a shock at the time, that she fainted.

They had thus four witnesses—Raven, Hepple, Hall, and Mrs. Nisbet. Raven swore to both men; Hepple swore to the prisoner and that his companion was of a build corresponding to that of the deceased; and Hall was watching the two men approaching the end of the train. This man swore to the deceased, and picked out prisoner as the man who resembled the man who was with the deceased. And they had the evidence of Mrs. Nisbet, such as he had outlined it.

The train left Heaton, and it passed Forest Hall, Killingworth, Annitsford, Cramlington, and Plessy, and arrived at Stannington at six minutes past 11 o'clock. At Stannington, Hall and Spink got out of their compartment. They stood upon the platform for a moment or two, and they saw the deceased alive, and apparently well, in the compartment next to theirs. They nodded to him, and he nodded to them. He was sitting with his face to the engine at the further end of the carriage farthest from the platform. The other man was sitting with his back to the engine. Hall said he did not notice another man in the compartments, but Spink said he saw the other man; and he would tell them that in his opinion he resembled in appearance the prisoner, although he could not absolutely identify him. That was the last time Nisbet was seen alive.

At Morpeth Station a man was standing on the platform when the train arrived. He would tell them that he passed this third-class compartment and looked into it, but saw no one in it. He did not go into the compartment, but went into another. The man who had been in the compartment with the deceased had got out at Morpeth. Morpeth was the station next after Stannington. There was someone in the compartment at Stannington, but no one in at Morpeth. The deceased was not visible; and, inasmuch as he was found under the seat at Alnmouth, dead and murdered, if he was not seen at Morpeth, he must have been murdered between Stannington and Morpeth. Who got out of the compartment at Morpeth?

Amongst others who got out undoubtedly—on his own confession—was the prisoner. By his own statement, he had booked to Stannington, but said he was reading his newspaper in the carriage, passed his station, and went on to Morpeth. The ticket collector at Morpeth would tell them that the man tendered him 2½d., the fare between Stannington and Morpeth, and went out of the station. The prisoner had said that himself in a voluntary statement.

The train went on, and it arrived at Alnmouth. The porter opened the door of the compartment, and saw under a seat the body of the deceased, with five bullet wounds in the head. Four of the bullets had been recovered—one in the carriage and the other three in the deceased's head. These bullets varied in character. Two of them were nickel-nosed. There must have been two pistols used. All the bullets would not fit the same pistol. The murderer must have used two pistols. He had traced the history of the case up to the discovery of the body.

On March 21, three days afterwards, a detective visited the prisoner's house, 1 Lilly avenue, Jesmond, Newcastle. He there told him that the county police had information that he (prisoner) had been seen in deceased's company on the morning of the murder, and asked him if he could throw any light on it. Prisoner said, "I knew Nisbet for many years. I saw him that morning. I booked at the ticket window after him, and went by the same train, but I didn't see him after the train left. I would have told the police if I had thought it would have done any good." Prisoner was asked, on that, whether he would have any objection to go to the detective office and see the superintendent, and he said he had not.

On arrival there he made a voluntary statement, which was taken down at the time. That statement was as follows:

"On Friday morning last I went to the Central Station, and took a ticket return for Stannington. Nisbet, the deceased man, whom I knew, was at the ticket office before me, and, so far as I know, had left the hall by the time I got mine. I went to the bookstall and got a paper, the Manchester 'Sporting Chronicle.' I then went to the refreshment room and had a pie and a glass of ale. I then went on to the platform, and took my seat in a third-class carriage nearer the hinder end than the front end. My recollection is, although I am not quite clear on the matter, that people entered and left the compartment at different stations on the journey. The train passed Stannington Station without my noticing it, and I got out at Morpeth and handed my ticket, with the excess fare of 2½d., to the collector. I left Morpeth to walk to Stannington by the main road. I took ill of diarrhœa on the way, and had to return to Morpeth to catch the 1:12 p. m. train, but missed it, and got the 1:40 p. m. at Morpeth. After missing the 1:12 train, I came out of the station on the east side, and turned down towards the town. I met a man named Elliott, and spoke to him. I did not get into the town, but turned and went back to the station, and got the 1:40 p. m. slow to Newcastle. I got a single ticket for Stannington, and did not give it up. I gave up the return portion at the Manors. I have been very unwell since, but was out on Saturday after-

noon and evening. I went on this journey to see Mr. Hogg, of Dovecote, in connection with new sinking operations there."

There were one or two observations he should like to make on that statement. According to the prisoner, he knew the deceased man. He said the deceased was at the ticket office before him, and "so far as I knew he had left the hall by the time I got mine." He (prisoner) then went to the bookstall, then to the refreshment room, then on to the platform, and then took his seat in a third-class carriage. If that statement was true, all that prisoner saw of the deceased was at the ticket office. He went apparently alone to the refreshment room, took his seat in the hinder part of the train, and did not see apparently the deceased after. That statement was in distinct flat contradiction with the evidence of a witness named Raven, who saw him in company with deceased when the ticket must have been taken. He watched them go from the refreshment room in which the prisoner said he had been. He saw them turn into No. 4 platform and proceed towards No. 5 platform. Then, if they believed the evidence of a witness named Hepple, the prisoner did not proceed to the hinder part of the train, but towards the engine end, and the last he saw of the prisoner and the other man was that one of them had his hand on the handle of the carriage close to the engine end. Prisoner said he got out at Morpeth and gave 2½d. to the collector. The train arrived at Morpeth twelve minutes past 11; and it was due out at 16 minutes past 11. Prisoner said that he missed his station inadvertently, and got out at Morpeth to go back to Stannington to visit a man called Hogg at Dovecote, some three miles from Stannington Station. There was a train back to Stannington at 11:24, which would allow twelve minutes to get from one side of Morpeth Station to the other. Prisoner apparently did not ask the ticket collector at all whether he could return to Stannington. He gave him 2½d. and went out of the station. He was going to Mr. Hogg's at Dovecote, and the nearest place to go from was from Stannington Station. He waited about for over two hours, according to his own statement, and he went back to Morpeth Station just in time to miss the 12 minutes pas 1 train back to Newcastle. He did not remain on the platform to wait for the 1:40, but went down in the direction of Morpeth, where, he said, he met a man named Elliott.

Then, after that, he came back and caught the 1:40 train back to Newcastle. What he was doing in those two hours they did not know. But there had been discovered since, the bag which was missing with all the money. The bag was discovered on June 9, nearly two months after the committing of this murder. It was found accidentally at the bottom of a shaft at the Isabella Pit at Hepscoth. He would call the witnesses who examined this shaft and found something lying on the floor. It was a leather bag, and it had been identified as the bag deceased carried in the train from Newcastle. It had been ripped open by a knife at the side, and the whole of the gold and silver was gone. There were some coppers in the bag; later on some further coppers were found strewn about the place where the bag had been thrown.

There was no question about it, the murderer had thrown this bag down

the pit with a view of preventing evidently its being subsequently found. This shaft was a mile and three-quarters southeast of Morpeth station. It was situated close to the highway, which led from Morpeth southeast. There was no doubt the person who murdered this man, if he got out of Morpeth station, as he (counsel) suggested he must have done, proceeded along this road until he got to this pit shaft, and took the opportunity to throw the bag down there. It would, he thought, be shown in the course of the evidence that the prisoner knew of the existence of the shaft where the bag was found.

After this statement was made by the prisoner to the police he was taken into custody, and charged with this murder. The reply he made was: "It is absurd for me to deny the charge, because it is absurd to make it. I only say I absolutely deny it." He was searched, and on him was found the sum of £17 9s 11d. Of that sum £15 was in gold, and it was in a bag marked "No. 1 Lambton and Co., Newcastle." His house was searched, and two pawntickets were found. Prisoner subsequently stated that he had pawned a pair of field glasses. There was also found two pass books—one of the National Provincial Bank and the other Lambton's. Prisoner appeared at one time to have kept accounts at these banks. Both the accounts were closed in December, 1909. Amongst his clothes was found a pair of suede gloves. An examination had been made of these, and they would have before them a witness, a professor, who had examined and discovered a smear of recent blood on the root of the palm portion, just below the left thumb. On examination of prisoner's trousers, it was found that there were blood spots inside the pocket of the lefthand side, which no doubt, were caused by the stained hand having been put into the trousers pocket. He proposed to prove to them that the prisoner was in a state of impecuniosity at this time. He did this advisedly. If he was hard pressed for money, and if he had no resources, that would, of course, supply a motive for this crime; and some explanation should be given of the sum of £17 9s. 11d. having been found in a canvas bag in the prisoner's pocket. He had told them that his banking accounts were closed in December last. About a month before this murder was committed prisoner obtained a loan of £5 on some small articles of jewelry from a jeweler, who would be called, and he had said he was hard up.

In October, 1909, he had borrowed the sum of £20 from a money lender called Cohen, paying £1 a month interest on it. He had paid no portion of the principal back, but he had paid the interest on it, the last being paid, he believed, before the murder was committed. It appeared there was an account at the Co-operative Stores in the name of prisoner's wife, and also an account at the Post Office Savings' Bank, also in the name of his wife. The amounts banked had been considerable—between £60 and £70 on one occasion—and in respect of one account there had been left £4, and the Savings Bank account showed that everything had been drawn excepting 10s. This was a matter the jury must undoubtedly take into consideration.

He thought he had described to them, as well as he could, the whole circumstances which the prosecution were prepared to lay before them.

He had said, the case was one of circumstantial evidence. If the jury believed it was the prisoner who entered the carriage with deceased, they had gone a long way towards arriving at a conclusion in this case. If in the carriage at Newcastle, was the prisoner the same man seen at Heaton by Mrs. Nisbet? Was he the same man seen by Spink at Stannington Station? There was no one in that carriage when another witness passed along the train at Morpeth. Whoever the murderer was, counsel thought he would get out at the very earliest opportunity after the murder was committed. It would never have done for him to have remained in the carriage, at the risk of anyone getting in at a succeeding station. Prisoner did get out at Morpeth, although he took a ticket for Stannington; and he was away for two hours. This was a case in which every single fact had to be taken into account. Every single fact, the prosecution said, tended towards showing that the prisoner was guilty of this murder. He thought he was right in saying that not one single fact pointed to any other conclusion, so far as his part in the history of the case was concerned.

THE EVIDENCE FOR THE CROWN.

WALTER HENRY DICKINSON, a civil engineer, produced a plan of the railway station at Newcastle and also the turn tables, on the day of the murder. MARK W. RAMSAY produced photographs of the entrance to the platform and of the carriage in which the body was found. CHARLES F. MURPHY, a surveyor showed plans of the district between Morpeth station and Stannington.

THOMAS ANDERSON, manager and cashier for Messrs. Rayne and Burn, the owners of Stobswood Colliery, said the deceased man was employed by their firm as a clerk and bookkeeper. He had been so for a great number of years. Deceased was a little man with ruficund countenance, and of thin and slender build. It was his duty every other Friday to take the money for the wages to the Colliery. On March 18 last, witness gave the deceased a cheque for £370 9s. 6d. It was on Lloyds Bank, at Collingwood Street, Newcastle, and the deceased would have to get it cashed. Deceased took with him to hold the money a black leather bag. It had a lock to it. Deceased had the key, and the size of the bag would be about a foot in length. It would be the deceased's duty to cash the cheque, and put the money in the bag, lock it, and take it to its destination. On June 13 last, witness saw the bag (produced), which was shown to him by Superintendent Marshall. He identified the bag as the one the deceased had taken away with him on March 18. It was locked when he saw it, and it had been slit along the top and down each side, and pulled open. He was shown some copper that had been got out of it, and a number of papers. The latter were the Colliery pay-bills for that day, which the deceased took away with him on March 18.

JOHN BRADSHAW WILSON, a clerk in the employ of Messrs. Lloyds Bank

at Newcastle, said he lived at 31 Lesbury Road, Heaton. He knew the deceased man, and he remembered him going to the bank on March 18, and cashing a cheque for £370 9s. 6d. He paid him in cash: 231 sovereigns, 206 half-sovereigns, £35 9s. in silver, and £1 0s. 6d. in copper. The gold was contained in three canvas bags, the silver in paper bags, and the copper in a brown paper parcel. The bank bags in use in their bank were canvas bags, with the names of Lloyds Bank, the North-Eastern Bank, and Lambton's Bank on them. They used all these bags. The bags (produced) had Lambton and Co., Newcastle, on them. Bags of that particular description were in use in Lloyds Bank in March last, and were now in use. The bags the gold would be put in on the day in question, would be one of the kind named.

Mr. Mitchell Innes: These bags seem to have had some wear?—Yes.

Do you know of your own knowledge that Dickman had an account at your bank for a considerable numbers of years?—I cannot say.

Assume for the moment that he had. Is it not quite a common occurrence that customers should receive money from you in these bags?—Yes.

Re-examined by *Mr. Tindal Atkinson.* We send out clean, as well as dirty bags.

Mr. Atkinson: Do you get them returned?—Sometimes.

There is "Please return these bags" on them?—Yes; but it is not always carried out. (Laughter.)

You say the gold was in three bags?—Yes.

Were the bags all of the same size?—I cannot say.

CHARLES RAVEN, commercial traveler, said he had known the deceased well for five or six years. He knew the prisoner by sight, and had known him eight or nine years, but did not know his name. On March 18 he was in the Central Station about 10:20 a. m. and was coming towards No. 4 gate from the west entrance. He was not going by train. He knew the passage leading to the Tynemouth part of the station. Witness indicated on a photograph where he was in the station, and said he would be about three yards from the railings and facing No. 4 gate. There were not many people about. As he was standing he saw deceased and prisoner coming together from the Tynemouth end. He saw them both go through No. 4 gate and turned to the right behind the cigar shop and in the direction of No. 5 platform. He did not see them speak. They went through the No. 4 gate side by side. When they were opposite the cigar stand he lost sight of them. He walked on. He saw the murder in the papers in the afternoon.

Mr. Mitchell Innes: They were not in conversation?—No.

And you lost sight of them behind the cigar divan?—Yes.

And that is all you saw?—Yes.

WILSON HEPPLE, an artist, living at Acklington, said he had known prisoner for the last 20 years. On Friday, March 18, he traveled from Newcastle by the 10:29 a. m. train. He saw prisoner when he was getting his ticket. He went on to No. 5 platform, selected a carriage, put his parcels on the rack, and got out and walked about the platform near the carriage door. He walked three steps only on each side of the doorway. In the

carriage in which he traveled there was, amongst other pictures, a picture of Brancepeth Castle. On April 3 he identified the carriage in which he traveled.

Mr. Lowenthal: The witness was shown in a photograph standing in front of one of the compartments in the third coach of the train.

Witness said while he was walking about he saw Dickman with a companion. The companion was a slightly-built man. From their demeanor, witness thought the men were talking to each other. They walked in the direction of the engine, and passed witness. He did not see them stop till they got near the engine. The last he saw of them was when one of them had his hand on the handle of a compartment in the first carriage. Witness then turned, and when he looked again they were not there. He never saw Dickman again that day. He went to Newcastle Station and was shown the train by Guard Wilkinson, and he could then, by experiment, point out the door of the coach where he saw the two men. Two men walked along the train and witness made a signal when he thought they were at the place where he saw Dickman or his companion with his hand on the handle. He had been walking about a considerable time when he first saw the prisoner and his companion. He began to think it was time the train started. The train left about a minute after he saw them.

Mr. Mitchell Innes: I understand you to say that you were walking up and down the platform three paces on each side of the door?—Yes.

So your turns were about six paces in length?—Yes.

Were you sauntering or walking fast?—Just leisurely.

I understand that what happened was that as soon as you saw these people you turned and walked six paces in the other direction, and when you turned round again they had vanished?—Yes.

You had walked your six paces between the time you saw them and then turned round, and then they had disappeared?—Yes.

When you got into the carriage did you do anything particular?—I just sat down.

How? With your back to the engine or the other way?—With my back to the engine.

Did you at that time notice anything or anybody in particular?—I just sat on the seat looking out of the window till the train started.

Did you notice anybody in particular?—Nobody in particular. There was no one to notice.

Was there anything to call your attention?—Nothing whatever.

You arrived that morning at the station in pretty good time for your train?—Yes, I did.

How long before your train went did you arrive at the station?—I arrived at the booking-hall about seven minutes past ten.

And it was then that you saw Dickman in the booking-office?—The window was not open when I got there.

No; but it was then you saw Dickman?—A short time after I got there I saw him.

How long after?—I could not exactly say how many minutes. I had been there some time before the window opened. I was the second passenger to get my ticket.

Did you go straight from the booking-office to the platform or not?—After leaving the ticket office I walked through the quadrangle to see where the train was to start from. There was no indication, and I waited a considerable time till the board was put up. As soon as the board was put up I went on to the platform and took my seat.

How long do you think you were going up and down in front of your carriage?—I should think about seven or eight minutes.

You did not know who Dickman's companion was?—No, sir.

And as far as your hearing went you cannot say whether they were talking or not?—Except by their demeanour.

Not by your hearing?—No, they were eighteen feet from me.

They never passed nearer to you than six yards off?—No.

Mr. Tindal Atkinson: You never heard them, but could you tell from their movements whether they were talking or were not? Their faces were turned towards each other, in conversation apparently.

Did you lose sight of them between their passing you, and when you saw the last of them when one man had hold of the handle?—They were never out of my view from first seeing them, as it were.

You did not notice the other man at all?—Not at all.

You could not give any description of him?—No, sir.

MR. JUSTICE COLERIDGE: You told us they were never nearer than eighteen feet from you. Is that so?—That is so.

Then you told us they passed you?—They passed me, at that distance from me.

What is the breadth of the platform?

Plans were handed to his Lordship, who examined them, and remarked that it was a very broad platform.

PERCIVAL HARDING HALL, in the employ of the Netherton Coal Company, said he lived at Deuchar street, Newcastle. He knew the deceased man Nisbet. He knew him as the Widdrington cashier, and had known him four or five years by sight. He had traveled in the same train with him for about the same period. They were both going on the same errand, witness carrying money, and the deceased carrying money. They had never traveled in the same compartment. On Friday, March 18, he was traveling from Newcastle to Stannington by the 10:27 train. He was accompanied by a fellow clerk named Spink. They got into the second compartment of the first coach, third-class. The first compartment was a smoking compartment. Witness got in and closed the door, but the window was down. After getting in he went to the door and looked out of the window up and down the platform. While he was looking out of the carriage window, he saw coming towards him the deceased man and a companion. They were about eight or ten yards away when he first saw them, and were coming in his direction. He kept them in sight as they approached. The men got into the compartment immediately in rear of that in which witness was. Nisbet was first, and Nisbet opened the door. He was quite sure it was Nisbet. He had not seen the other man before, to his knowledge. He had a fairly good view of him for two or three seconds, close to. It was close on train time when he saw them. On March

21 he went to the Central Police Station at Newcastle, and was taken to a room where there were nine men set before him. He pointed out someone. He pointed out a man as very much resembling the companion of Nisbet, and he made one or two remarks at the same time in the presence of the prisoner. He said words to the effect that if he was assured that the murderer was amongst the nine men he would have no hesitation in picking the prisoner out. He had it in his mind that the prisoner very much resembled the party he saw on the 18th. At Stannington he got out of the train with Spink. They waited for the train to pass out of the station, as they had to do before leaving the platform. While standing there he observed Nisbet sitting in the compartment immediately in the rear and as the train was going out deceased looked in their direction, and witness bowed to him. He was quite sure the deceased was in the compartment at Stannington when the train left. He could not say whether there was anybody else in the compartment or not. He subsequently gave a description of the man whom he had seen at Newcastle with Nisbet to the police. The man he saw with Nisbet had an overcoat on—fawn colored to the best of his knowledge; and he had on a hard felt hat.

Mr. Mitchell Innes: I do not think you said anything at the police court about the man wearing a fawn overcoat?—I gave that description to the police.

You never said so before the magistrates?—I was never asked.

I want to ask you about this so-called identification. You went down to the police station and there found a policeman. Who was the first policeman you first saw there?—I saw a number together.

Can you mention one who seemed to be in control?—I could not say who was.

Do you know Superintendent Weddell?—Yes.

Was he there?—I think he was. He was there later, anyway.

You went into a room and found nine men standing in a row?—Yes.

You walked down more than once. I put it you walked two or three times and picked out nobody?—I walked once down the room.

I put it to you, you walked more than once?—I think not.

Please, you think not? Will you swear you did not walk more than once? Now be careful!—To the best of my knowledge I walked down once, and came straight back to the prisoner. I had a look at each one.

Then you won't swear you did not walk down more than once. Be careful, please.—No, I will not swear that.

I put it to you that you went away from the row of men and approached an officer—I don't care who he is. Is that right?—That is so.

And that you said something to that officer—what was it? Tell me what you said to the officer.—I asked him what I was expected to do.

By that time you had already walked down the line at least once?—Yes.

Do you mean to say you were not told, before you walked down the line, what you were expected to do? What had you gone there for?—I had gone there to try and identify the companion of Nisbet.

Why did you ask the policeman, what were you expected to do?—Because I wanted to know if by pointing out a certain man I was swearing that was the man I saw getting in with Nisbet.

How did you come to think that you were swearing anything? You had not been asked to take an oath?—In my own mind I understand that was what identification meant.

But you had not been asked to swear anything or to take any oath?—I suppose not, no.

Was it, Mr. Hall, that you were afraid of binding yourself with the same effect as if you had sworn?—That was it exactly.

You were not sure enough to bind yourself absolutely by pointing out anybody?—That was just it.

When you asked the policeman or officer, "what am I expected to do?" what did he answer?—He said, "point him out."

But you knew before you had to point him out?—Yes.

After he said, "Point him out," what did you say?—I said I would not swear that the man I was going to point out was the companion of Nisbet, but if I was assured that the murderer was there, I would have no hesitation in pointing out that man—and I pointed to the prisoner.

Just pause a moment. You gave evidence about this before?—Yes.

You were cross-examined on the question?—Quite.

May I remind you what you said then? I suppose you saw your deposition, after it was read over, and signed it?—Yes.

What you said then was: "I won't swear that the man I pointed out was the man I saw get in with Mr. Nisbet, but if I could be assured the murderer was there, I would have no hesitation in pointing the prisoner out." Today you have told us—I don't want to catch you—that what you said was I won't swear that the man I am going to point out was the man I saw get in with Mr. Nisbet. Had you pointed the man out or not when you said that?—I made that statement before. I pointed the man out, to explain my action.

But these are the words you used before the magistrates, "I won't swear the man I pointed out was the man I saw." When you had used words something like that had you pointed the man out, or were you still going to point him out?—I was just going to point him out. I was referring to the question of attempted identification.

Your account now then is this:—I understand you put it that you won't swear you walked down the line more than once, that you went to a policeman and asked what you were expected to do, and that he said, "Point him out."—I said I would not swear the man I am about to point out was the companion of Nisbet, but if I could be assured the murderer was there I would have no hesitation in pointing out that man, and pointed to the prisoner.

Curious expression to use, "murderer?"—Perhaps I should have said companion of Nisbet. It would have been better, perhaps.

Did you use the word murderer because you had formed some conclusion in your mind in regard to this case?—No.

Mr. Mitchell Innes: Simply a pleasant way of referring to the prisoner!

Re-examined, witness said he knew a murder had been committed, and everybody knew it in the district. He knew what he had been called to the police station for.

Are you sure you used the word murderer or companion of Nisbet?—I think I used the word murderer.

JOHN WILLIAM SPINK, a clerk living at 51 Highbury, Newcastle, said he was a fellow clerk with the last witness. On March 18, he traveled with last witness to Stannington in the second compartment of the first coach. When he got into the carriage, he sat down and did not see anybody on the platform. At Stannington they both got out of the train and put their bags on the platform. While standing on the platform, they saw the deceased and a companion in the carriage to the rear of the one they left. The deceased was sitting facing the engine, on the far side of the carriage from the platform. Deceased nodded to them. Witness could not say who the other was.

Mr. Lowenthal: Did he resemble anybody you have since seen?—Yes, he was like the prisoner.

He was like the prisoner, but you won't swear whether he was?—That is so.

Witness added that he never saw anyone else in the compartment.

Mr. Mitchell Innes: Was the train moving when you saw the deceased and this other man?—I saw them before the train started to move.

You saw them before the train started?—Yes.

I don't want to labor this point. I want to remind you that what you said before the magistrates was this—"I noticed the train pass out from the station on its journey. Then I noticed Nisbet"?—I saw him then and before.

How long before the train began to move?—Immediately we got out, I put the bags on the platform, and then we saw him.

How soon did the train begin to move?—In about a quarter of a minute.

I suppose you would put your bags down opposite the carriage?—Not necessarily. Between our carriage and the other one.

I understand your account of the matter to be that Mr. Nisbet was facing the engine, and the other man was sitting with his back to the engine?—That is so.

Now, you had an opportunity of identifying this man. You were taken like your friend to identify him?—I was.

And you could not?—No, I could not.

Mr. Tindal Atkinson: Did you notice whether the man you saw in the carriage had a moustache?—He had.

Did you notice what sort of a hat he was wearing?—A black felt hat.

Mr. Justice Coleridge: Hard or soft?—Hard.

Mr. Tindal Atkinson: When you were called upon to pick out the man you had seen in the railway carriage, did you pick out anybody else?—No, I said nothing.

CECILY ELIZABETH NISBET, widow of the deceased man, was the next witness, and appeared in the box in heavy mourning, and was accommodated with a seat. She said the deceased was her husband and they lived at 180 Heaton Road, Newcastle. He was 44 years of age, and 5 feet 3 or 4 inches in height. He had a fresh complexion, a moustache, and wore gold spectacles. He was at the time of his death in the employ of the

proprietors of the Stobswood Colliery, and had been so for a number of years. On alternate Fridays, he went to Widdrington with money to pay the men's wages, and usually traveled by the 10:27 train. Heaton Road was close to Heaton Station. She had been in the habit of going to the station to meet the train on the way to Widdrington, and speaking with her husband. On Friday, March 18, she went to Heaton Station to meet the train. In the first instance she went to the rear of the train, as it was more in keeping with her husband's habit to travel there. On finding he was not there, she went along the platform and noticed her husband looking out of a carriage window, close to the engine. She had a conversation with him. Whilst she was talking, she noticed there was someone else in the same compartment. It was a man, and he was sitting on a seat facing the engine at the far end. She saw his profile. He had his coat collar hoisted up, and he never moved. There was a shadow from the tunnel right on to the seat of the carriage. The shadow of the tunnel was on the seat, but she saw the profile of the man distinctly. She remained there until the train went out. There was no one else in the carriage except her husband and this man. She gave evidence before the magistrates and also before the coroner. Her evidence was taken down, and after her evidence had been given she left the witness box. She had to be carried from the box, having fainted when she answered her last question. She had seen something that caused her to faint. She had recognized the man she saw in the train in the same position exactly. That was the first time she had seen his face exactly in that position since that morning. Up to that time she had said she could not identify the man distinctly.

Mr. Tindal Atkinson: Having seen what you told us, are you able to give any opinion as to who was the man that you saw in the carriage?—Yes.

Who was it?—The man in the dock, Dickman.

Are you certain?—Yes; perfectly certain.

Mr. Mitchell Innes: You are more certain now than you were before the magistrates?—Yes, I am certain.

Because so far as you got that day, according to your evidence, is that he resembled the man sitting behind you. You saw this man in court, and, pointing to Dickman, you said he resembled the man.—Yes; I recognize him distinctly.

What has made you certain since you said that? I thought you told my friend you were quite certain this was the man?—Yes.

Why are you certain now if you were not certain before the magistrates?—I don't remember if I said that.

What you said before the magistrates was, "he resembled the man sitting behind you, with his face this way." Was that what you said?—If it is there it will be right, but I scarcely remember. I wish you would not call me Mrs. Dickman, you have done that all through?

Mr. Mitchell Innes: I beg your pardon. Do you remember, Mrs. Nisbet, saying on the first occasion, "I can only say there was another man there in the compartment"?—Yes, I did say that.

There was a heavy shadow thrown right on to the man?—Yes.

You describe the shadow in this way, "What I did see was a shadow right on to the man sitting on the seat in the far corner of the carriage"—Yes; that is right.

He had his hat on?—Yes.

And his collar hitched up in the way you have described it?—Yes.

You are quite sure he was sitting with his face to the engine?—Yes.

Re-examined, the word "resembled" has been written down as your evidence. Do you remember whether the word "resembled" was yours, or that of the person who examined you?—I don't remember, but after recognizing the man in the dock, I was perfectly sure.

After the first time you were before the magistrates you say at the conclusion you fainted?—Yes; I told them what was the cause of my fainting, and I wished to be called up again but was not called on.

You asked to be allowed to make a statement?—Yes, sir; I did.

JOHN ATHEY, a ticket collector at Morpeth Station, stated he was on duty on March 27, when the 10:27 train from Newcastle arrived up to time at Morpeth. A man passed the barrier and paid excess fare. He tendered an outward portion of a third-class ticket from Newcastle to Stannington and 2½d. in addition. The man said he thought 2½d. was the correct fare from Stannington to Morpeth, and witness replied, "Yes." The man's overcoat was loose and he had the ticket and 2½d. ready in his hand. There was no other excess fare collected that day. He had not been able to identify the man, who gave the ticket. The man resembled the prisoner, but witness was not quite certain. A train returned to Newcastle at 11:24. The man who tendered the excess fare did not ask about any return train to Stannington.

Mr. Mitchell Innes: Have you any doubt that this is the man (pointing to the prisoner)?—I would not like to be positive. I can only say he is like him.

JOHN GRANT, a platelayer of Ulgham Lane, said he remembered traveling by a train due at Morpeth at 11:12 on March 18. He joined the train at Morpeth and traveled to Longhirst. As he went along the train he looked casually into the third compartment of the first carriage and saw no one. If anybody had been visible in the carriage he would have seen him. He went into the first compartment of the second carriage from the engine. He saw a Mr. Bruce sitting in the first compartment of the first carriage. He noticed no one in any of the other compartments of the second carriage. Mr. Bruce was sitting with his back to the engine on the platform side.

JOHN THOMAS COSKER, a porter at Longhirst Station, said he was on duty on March 18, and saw the 10:27 train from Newcastle stop at Longhirst. He was at the north end of the platform when the train came in. He was meeting the engine, and when the train stopped he was opposite the front van. He saw some passengers in the first compartment of the first coach, but there was none in the second and third compartments. He saw the last witness alight from the first compartment of the second carriage.

GEORGE HARKER, station master at Pegswood, said he was on duty when the 10:27 a. m. from Newcastle arrived on March 18. He was on the platform when the train arrived. Two passengers alighted from the train, a woman and a little girl. The woman was Mrs. Dawson, of Railway Cottages. He was not at the front of the train, and did not examine it.

GEORGE WILLIAM YEOMAN, station master at Longhirst, said he remembered the 10:27 from Newcastle arriving on March 18. Three persons got out—Platelayer Grant, and a man and woman belonging to Morpeth. He knew the latter by sight, and thought they were named Foster. The man and the woman returned by the 3:31 train the same afternoon. He knew the deceased well, but never saw him that day.

JOHN YEOMAN, stationmaster at Widdrington, said he was on duty when the train in question arrived on March 18. He expected someone by the train, and looked through the carriages. He knew deceased well, but did not see him in the train.

ANDREW BRUCE, carriage inspector, in the service of the Railway Co., stated that he traveled on March 18 last by the 10:27 train from Newcastle. He was in the first compartment of the coach next to the engine. There was another gentleman in the carriage, and he got out at Chevington. Witness saw two young men, the witnesses Hall and Spink, with bags, get out at Stannington. When the train started Hall nodded to some one in the train. Witness traveled from Newcastle to Alnmouth. He saw Hall nod after the train had started.

THOMAS WILLIAM CHARLTON, foreman porter at Alnmouth, said he was on duty at that station on March 18 when the 10:27 train from Newcastle came in. He examined the compartments and opened the door of the third compartment of the first carriage. When he opened the door and looked in he found three streams of blood across the compartment, coming from a seat at the far side. He opened the door on the righthand side from the engine. He looked under the seat and found the body of a man lying face downwards on the righthand. The blood was coming from where the head was. He found a hard felt hat beside the head and a pair of spectacles in two pieces. He found one of the pebbles of the spectacles on an arm rest on the seat facing the engine. The head was away from witness. The train was shunted to a different platform at Alnmouth, and witness opened the door at the opposite side to that by which passengers would alight and join the train on the road. The train arrived up to time, but the express which should have preceded it was late, and the train was shunted in consequence.

Mr. Tindal Atkinson: Did you see any firearms?—No, sir.

Did you see any bag?—No, sir.

Did you move the body yourself?—No, sir.

I think you called the police in?—I sent for the guard of the train, called for one of the porters and for the station master.

Did you find a ticket?—The station master found a ticket.

MR. JUSTICE COLERIDGE: A ticket to Widdrington from Newcastle?—A return ticket, Newcastle to Widdrington.

ROBERT WILKINSON, guard of the 10:27 train on March 18, said the train

was composed of four coaches, and a brake at each end. He traveled in the rear brake. He saw the train made up again on April 3, and the photograph (produced) showed the train as it was on March 18. He examined the carriage when the train was made up and found a carriage with a picture of Brancepeth Castle.

WILLIAM HOGG, contractor, Pegswood, said he had known prisoner for eight or ten years, when he was secretary at a colliery at Morpeth. On March 18, he had no appointment to meet the prisoner at Stannington. Witness on that day was in Newcastle. He was engaged in sinking operations at a place called Dovecot to which Stannington was the nearest station. Prisoner had visited him four or five times. The last time he was there was on the Friday, a fortnight previous to the tragedy.

Mr. Tindal Atkinson: Had you any appointment with the prisoner, on this day?—None, sir.

Did you know he was coming?—No, sir.

Had he anything to do with the work you had got on hand?—No, sir.

What train did he come by when he came the fortnight before?—He would come with that train something after ten from Newcastle. It was about 12 when he came to see me.

Did he ever ask you for any money?—On one occasion only—somewhere about the back end of last year, about the December.

I have reason to ask you, but are you sure about the date?—I have not the date. I could not tell.

What did he ask you for?—He asked me for £2.

Did he say why he wanted the money?—He said he was needing a couple of sovereigns to put him over.

Do you mean to tide him over, or what?—To tide him over; he said something to that effect. I gave him a sovereign.

Cross-examined: Did you understand it was to tide him over the weekend?—That was why.

You have known the prisoner some time?—Yes.

You are engaged in sinking operations?—Yes.

ANDREW TAIT, detective, said that on March 21 he went to 1 Lily avenue, Jesmond, where the prisoner lived. He rang the bell, and prisoner answered the door. Witness said, "Are you Mr. Dickman?" and he said "Yes." Witness asked, "John Alexander Dickman?" and he said "Yes." Witness asked if he had been employed as a bookkeeper with a firm of ship brokers in this city and he replied "Yes." Witness told him who he was, and added that the Northumberland County Police had heard that he was in the company of Mr. Nisbet on the previous Friday. Witness added that he had since learned that he was an acquaintance of Mr. Nisbet, and that the Northumberland Police would like to know what light he could throw upon the affair. The prisoner replied, "I knew Nisbet for many years. I saw him on that morning. I booked at the ticket window after him, and went by the same train, but I did not see him after the train left. I would have told the police if I had thought it would have done any good." Witness asked the accused if he would accompany him to the detective office, and see Superintendent Weddell, and accused said "Cer-

tainly." Accused returned into the back sitting room, and put his boots on having previously had only his slippers on. Witness introduced the prisoner to Superintendent Weddell at the police station, and the Superintendent took from him a voluntary statement, in witness's presence. After Superintendent Weddell had taken the statements, he read it to the prisoner, who said it was correct. The sum of £17 9s. 11d. in money was found upon the prisoner—15 sovereigns in a Lambton's Bank bag, and the remainder loose in his pockets. They found also a pair of gloves, a cigar case, a card case containing a local money lender's card showing an advance to accused of £20 in October, 1909. There were eleven articles altogether found on the prisoner, including a pair of brown gloves.

The Prisoner: You have not mentioned the diary you found. You will see my signature in it.

Witness held up the diary referred to.

Mr. Mitchell Innes: The prisoner wishes the Court to see the way he signed his name in the diary.

Mr. Tindal Atkinson examined the diary, and prisoner stood up and leaned over the front of the dock in his direction.

Cross-examined, witness said the prisoner made his statement perfectly freely and readily, and went with him readily when requested to do so. He showed every disposition so far as witness could judge to assist the police. Until the prisoner told him that he had booked at the same time as Nisbet that morning and had gone by that train, witness was not aware of the fact. That was the first he had heard of it.

Re-examined, witness said the Northumberland County police were the persons getting up this case, and the information he had was got from that source. It was in consequence of that that he went to see the prisoner.

MR. JUSTICE COLERIDGE: You did not know how much the county police knew or suspected?

Witness: No, my lord. We got a telephone message on the Sunday that a man named Dickman had been seen with Nisbet in the Central Station. I made inquiries on the Sunday night to locate Dickman, and I made inquiries on the Monday, and I was not very sure that I had got to the right man's house because he was living in a £30 house—£40 with the rates—in a good residential district. All my inquiries amongst people who knew him showed that he was very hard up, and I was therefore not sure that he was the man.

SUPR. WEDDELL said he became aware of the murder on March 18. On March 21 he was at the City Police Station, and there saw the prisoner and the last witness. The last witness said "This is Mr. Dickman, and he will give you a statement respecting what he knows about the train murder on Friday." Witness then took down a statement from the prisoner, and afterwards handed it to him to read. It was a voluntary statement. Prisoner read it, and said it was quite correct. The statement read in the opening speech for the prosecution was the statement. The prisoner was arrested, and the things found upon him were as stated by the last witness. On being cautioned and charged with the murder of John Innes

Nisbet, the prisoner replied: "I don't understand the proceedings. It is absurd for me to deny the charge because it is absurd to make it. I only say I absolutely deny it." Witness made an examination subsequently of the house of the prisoner. In a bureau he found various papers and letters and books relating to banking. There was also a life preserver. On the 26th, on another visit to the house of the prisoner, he found two pawn tickets (produced), one dated March 30. The pawnbrokers were J. and E. Wilson, 12 Pilgrim street, Newcastle. The article pawned—a pair of field glasses—was pawned in the name of John Wilkinson, 180 Westmoreland Road, and the amount was 12s. The pawnbroker's name on the second ticket was James Summerfield and Sons, of Pink Lane, Newcastle. The ticket was dated March 17 of this year, and related to a pair of field glasses, which were pawned for 15s. Witness produced other papers and letters that he found, and also two pass books relating to accounts at the National Provincial Bank and Lambton's Bank, which prisoner had had at one time.

The Prisoner (interrupting): Those accounts are not closed, excuse me interrupting.

MR. JUSTICE COLERIDGE, examining the pass-books, said that the National Provincial Bank book was made up to December 31 last, when there appeared to be a debit balance of 3s. Lambton's Bank book appeared to be made up to August 11.

Mr. Tindal Atkinson said he would call the cashiers from each of the two banks.

Witness (continuing) produced a pair of trousers made by Burnand, and a pair of Suede gloves. He found a slight dark stain on the thumb of the left glove. He had cut out the stained piece and given it to Dr. Bolam. Witness did not notice anything on the trousers, which had also been submitted to Dr. Bolam. Witness was present in Newcastle station on April 3 when a train was made up as it was supposed to have been when it left Newcastle at 10:27 a. m. on March 18. Hepple was on the platform, and he identified the compartment in which he was riding by the picture of Brancepeth Castle. Hepple stood at the door of the compartment spoken of, and witness and Supt. Tough went towards the front part of the train. Hepple arranged to give them a signal to stop when they got to the place where he last saw Dickman about to enter the compartment. Witness explained how the experiment was carried out, and said he and Superintendent Tough walked forwards so far along the train, then turned round, and walked backwards so that they could see Hepple who had arranged to hold up his hand when they got to the place.

Dr. Chas. C. Burnam testified to the nature of the wounds from which the deceased died.

SECOND DAY. (July 6th.)

The court opened at 10:30 a. m. and as soon as Lord Coleridge took his seat the witness, JOHN ATHEY, ticket

collector at Morpeth station, was recalled, and his Lordship said he desired to ask him one or two questions.

MR. JUSTICE COLERIDGE: I want to ask you a question or two in relation to the incident of excess fare being paid at Morpeth. Did you say that the man whom we now know to be the prisoner because he says so, had on a greatcoat?—Yes; he had on a greatcoat.

Can you tell what the color was?—No.

Could you tell whether or not he had a bag with him?—I cannot swear positively. I could not see his right hand.

You cannot say whether he had a bag or not?—No.

You have seen the bag, and it is one of considerable size?—Yes.

And still you cannot say whether he had a bag or not?—If he had, it would be under his coat, but I could not say if he had a bag.

He was not carrying a bag out?—No; but I could not see his right hand.

You said something about his holding his coat?—The overcoat overlapping the hand. It was open, and I could not see the right hand.

MR. JUSTICE COLERIDGE (to the jury): Is that what you want?

The Foreman: Yes.

THOMAS SIMPSON, in the employ of Messrs. Pape, gunsmiths, Collingwood Street, Newcastle, said he had been shown the four bullets (produced) by Supt. Weddell. They differed in appearance and size. Two of them were coated with nickel; they were of .250 calibre. The two others were lead bullets, uncoated, and the size was .320. The nickelplated bullets would be fired from a self-discharging automatic pistol. The cartridges were contained in a magazine, and there would be seven cartridges when the weapon was fully loaded. The automatic pistol was known in the trade as a magazine pistol.

MR. JUSTICE COLERIDGE examined the pistol.

MR. TINDAL ATKINSON: The pistol is flattish, and could be carried easily in the pocket?—Yes.

Witness, continuing, said the two other bullets were larger. They could not have been fired from the pistol produced. It was of a common size. If the four bullets were found in the dead man's body they must necessarily have been fired from different pistols. These pistols were such as were ordinarily on sale at a gunsmith's.

MR. MITCHELL INNES: And could easily be purchased by anybody?—Quite easily.

And the same thing is true of the bullets?—Yes.

ANDREW KIRKWOOD, in the employ of Mr. Pape, said under the Pistols Act of 1903 they kept the register produced. Witness's attention was directed to an entry in the register which he said was in his handwriting. When a revolver was sold it was entered in the register. Witness made an entry in the book when he sold a revolver, and sometimes when one was sold by someone else in the shop.

MR. TINDAL ATKINSON: Can you say that you yourself, by looking at that entry, sold that particular pistol to the person whose name appears in the

register?—No; I could not say that I sold it myself. I could not swear to that.

You have made the entry in those circumstances from information given to you by somebody else?—I might have sold it myself. It is such a long time since that I cannot tell now.

Do you mean to say it might have been sold by somebody else who gave information to you, and you might have entered it in the book?—Yes.

Mr. Tindal Atkinson: That is my difficulty, my lord.

Mr. Mitchell Innes said he appreciated very much the absolutely fair way in which the case was conducted.

POLICE SERGEANT PETER HALLIDAY, stationed at the Moot Hall, Newcastle, said the prisoner was, on March 30 last, in custody in the cells in the Moot Hall, and witness took from him a Burberry overcoat and certain other clothes produced. He handed the overcoat to Dr. Bolam on the evening of the same day. Prisoner was wearing it when he was brought in, but he took it off in the cell.

DR. ROBERT A. BOLAM, M. R. C. P., Professor of Medical Jurisprudence in the College of Medicine at Newcastle, said a pair of Suede gloves, a pair of trousers, and what was known as a Burberry overcoat, were handed to him. He examined the gloves and found blood on them. He could not swear that it was human blood. It was mammal blood. He found also stains inside the pocket of the prisoner's trousers.

Can you tell these stains were recent stains of blood?—They were recent.

And you examined them, when?—On the 26th of March.

These stains had been made within what space of time?—Within the space of a fortnight.

Did you also have handed to you a Burberry overcoat?—I had.

It is called a Burberry. We understand by that it is prepared cloth?—Yes.

The outside is prepared in some way to resist the rain?—Yes.

Did you find anything on that overcoat after it had been handed to you?—There was a large stain upon the left front. I cut out a portion for examination. The stain still persists below.

You have examined that carefully?—I have.

MR. JUSTICE COLERIDGE: (pointing to the coat): Is that part of the stain untouched?—Yes; it is still persisting.

Mr. Tindal Atkinson: Could you tell whether or not, from an examination of the stain originally on the coat, it had been treated in any way?—The surface was frayed, as if it had been rubbed. The edges were cleaner than any other portion adjoining. It smelt faintly of paraffin, and, microscopically, there were droplets of oil, which might have been paraffin.

Are you mentioning this as a reason for coming to any conclusion. I asked you, you know, whether you could say if the stain had been treated or not?—Yes, it had evidently been rubbed, and it was stained with paraffin. I could come to no further conclusion.

Now, assuming for a moment that there was a stain of blood, on a material of this kind, would it be possible to wash out the traces of blood, either by water or by paraffin?—It would be possible.

I say on material of this kind—Yes, on material of this kind.

You have got the coat before you. Are there pockets in it?—There is a large pocket, entered by a slit, on either side.

You may put a hand through the slit into the pocket?—Yes.

Witness drew the pocket out, and held it up.

Counsel: That is a pocket that would easily hold a pistol like that that has been produced?—Yes.

Or it could be held through the slit and covered by the coat?—Very easily.

Or a bag or any other article might have been held underneath the coat by a hand through the slit.—Quite easily.

Mr. Mitchell Innes: Can you find any evidence of blood whatever on the Burberry coat?—None, sir.

Of any kind?—Not of any kind.

So far as the stain itself is concerned, when you saw it, it might have been anything, any kind of dirt?—It was a stain of paraffin, with a conception of the lighter area outside.

You mean where it was more rubbed?—Where it was more cleansed.

And if the outer area was more cleansed, it would mean that the original stain was more successfully removed?—I am not in a position to state that.

I understand it to be said that this was a longish stain. Part of it was less well cleansed and part of it better cleansed. What do you mean by the outer area?—The fringe of this area described showed a portion on which there was no paraffin, and it was lighter than the surrounding area, lighter than any other portion of the coat.

That portion, I understand, had never been covered by the stain?—No; never been covered by the paraffin stain.

But whether outer or inner area, there was no trace whatever of blood?—No.

Would someone produce these gloves? Would you be kind enough, Dr. Bolam, to hold that glove up with the left thumb extended, and show the point you cut out, and the other tip of the finger? Would you kindly produce the part you cut out?—I can only produce parts of it.

Is it true to say, Dr. Bolam, that the little shawl pin points of blood in the pocket were in such a position as might have been caused by this thumbed glove being put into the pocket?—Yes.

The stain on the coat might have been contracted at a colliery, with dirt and coal dust about? It might have been caused by that and then treated with paraffin?—So far as I can tell.

There is nothing to make you conclude otherwise?—No, sir.

MR. JUSTICE COLERIDGE: Supposing the stain had been blood, would paraffin remove the signs of it?—It would vitiate some of the tests, and prevent their application.

PETER SPOONER, colliery manager at Barmoor East Colliery, said that on June 9 he went to No. 1 seam, and examined the air shaft. The pit was

the Isabella Pit. He saw something lying at the bottom of No. 2, which was the leather bag that had been produced. The bag had been cut. He found some coppers in it, and also at the place he found a considerable amount of copper, 14s. 8d. in all. He handed the bag to Superintendent Marshall, together with the papers which were in it at the time. He knew the prisoner, and had been a fellow workman of his. He had talked to him about the difficulties at their mine, which were troubles about the large quantity of water. He did not know that prisoner knew where the pit was, but he had discussed the matter of water with him. The airshaft was covered with an iron gate, which could be quite easily lifted with the hand.

THOMAS MARSHALL, Superintendent of Police at Morpeth, said he received the bag from the last witness, the papers and 14s. 8d. in money. Witness made further searches, and found 4s. 9d. in copper, making a total of 19s. 8d. in copper.

SAMUEL COHEN, manager of the Cash Accommodation and Investment Company, Northumberland Street, Newcastle, said he knew the prisoner, who came to his office about October 15 last. He asked for the loan of £20, and said he would probably want it for about three months at the outside. He asked the charge, and witness told him he would charge £1 per month. Prisoner told him he had applied to other money lenders, but their charges were too much. The prisoner said he would consider witness's terms and went away, and returned again on October 18, and witness lent him £20. Prisoner gave him a promissory note, and paid the interest every month. After the three months, in the month of January, the prisoner said he could not possibly meet the amount and asked for a further period of three months, which witness agreed to. The last payment of interest was made on March 17. He remembered the prisoner writing to him in November with reference to a loan of £200 for a gentleman named Christie. Prisoner introduced him to Mr. Christie at his (witness's) office.

You have told me that £20 was lent to him on October 18. Can you tell me how that was paid?

MR. JUSTICE COLERIDGE: Who paid any commission?

Witness: On Christie's loan?

MR. JUSTICE COLERIDGE: Yes.

Witness: I did not.

Mr. Louenthal: How was the £20 paid?—The principal of the £20 was paid by the prisoner's wife.

In what form was the £20 paid?—It was paid by me to the prisoner in cash.

To whom was the £200 paid by you on November 24?—To Christie. It was made in a cheque payable to Christie.

Do I understand that the last payment of interest by the prisoner was on the 17th of March in respect of the £20?—That is so.

Do I understand that since that date the principal loan has been repaid?—That is so.

On what date?—In May. I believe it was the 9th of May.

Mr. Tindal Atkinson: Of this last year?

Witness: This last May, sir.

Mr. Mitchell Innes: By whom, Mr. Cohen?

Witness: By the prisoner's wife, sir.

JOHN KETTERER, of Messrs. Kuss and Co., jewelers, Newcastle, was next examined, and stated that on February 14 last he saw the prisoner, who came into their shop. He said "Good morning," and, though he (witness) could not give the exact words he said he wanted some money.

Mr. Tindal Atkinson: Did he say why he wanted some money?—No, sir. He just said, so far as I can remember, "I must have £5 to go to Liverpool."

Did he say anything as to his financial condition for money at that time?—No, not that I remember.

Did he say where in Liverpool he was going?—No, I think there was some racing or something of that sort. I think there was the Waterloo Cup.

MR. JUSTICE COLERIDGE: For the Waterloo Cup. Did he say that?—Yes, sir.

Witness continuing, said prisoner offered as security for the £5 some articles of jewelry, which he had bought there some three years ago. There was a gold scarf ring set with three brilliants, a set of studs, and links. They had been worn for some time. Witness took these articles and lent prisoner the £5, and he saw him three or four days afterwards. Prisoner then said he was not in a position to pay him back at present, but he (witness) would not have to wait very long. It would be all right. Witness had still the articles in his possession. Prisoner had not yet paid back the money he got.

Mr. Mitchell Innes: I think the studs and sleeve links were gold?—Yes.

JOHN BADCOCK and Robert Sedcole, bank clerks, testified as to the state of prisoner's bank accounts at certain dates.

FRANK CHRISTIE, coal merchant, said he knew Dickman, and first knew him when he was secretary of the Morpeth Moor Co., about six years ago. That company was now extinct, and there was a new company in which Dickman had no office. Witness occasionally hacked horses through Dickman. He borrowed £200 from Cohen, to whom he was introduced by Dickman. The cheque was made out to witness, who endorsed it and handed it to Dickman.

Mr. Tindal Atkinson: What was the £200 for?—Partly on my own private affairs.

How much: About half of it.

And the other half, what was done with that?—It went for betting transactions.

Was it to be used by Dickman for betting, or what?—Yes; through him.

On whose account?—On mine.

Was Dickman to receive anything himself out of it, supposing it was successful?—Yes, undoubtedly.

How much?—There was no definite arrangement. Witness ultimately got about £100.

Mr. Tindal Atkinson: What became of the rest?—I could not tell you. Did he tell you what had become of it?—He said the transactions had not come to anything. The betting was not successful.

Cross-examined by *Mr. Mitchell Innes:* Dickman had nothing to do with the sinking operations at Dovecot. Witness was interested in them. The sinking was for coal. Dickman had no authority from witness to go to Dovecot. He came to witness's office pretty regularly after the sale of the colliery and gave him information about the Morpeth Moor Colliery.

I don't suggest he was interested in it pecuniarily. I take it that he was interested in it in the hope of getting some commission out of it?—He would get it when the colliery was sold.

What I mean is, he wanted the thing to go on successfully. I suggest to you that he talked about Dovecot colliery as well as Morpeth Moor colliery.

MR. JUSTICE COLERIDGE: Is Dovecot different from Morpeth Moor?—Yes. Have you anything to do with Dovecot?—Yes.

And with Morpeth Moor?—It was sold last year.

And this year you had nothing to do with it?—Nothing whatever.

Mr. Mitchell Innes: I suggest that the prisoner did in fact mention Dovecot Colliery to you in your office sometimes?—He might have done so, but I have no recollection of it.

Did you ever go out to Dovecot Colliery?—Oh, yes.

I suggest that on one occasion or, perhaps more, you suggested to Dickman that he should accompany you to Dovecot?—I might have done so, but I have no recollection.

There would be nothing surprising if you had? I don't think so.

You are quite clear that the prisoner had more than £100 of that £200?—It would not be very much.

I suggest to you that he got £150?—He would not get as much as that.

You say over £100?—He probably got a little over that.

WILLIAM ALBERT CHRISTIE, a clerk in the Savings Bank Department of the General Post Office, London, was then called.

Having taken the oath, witness, addressing his lordship, said: Before I give this evidence I must ask your direction under the Secrecy Clause of the Act of Parliament. We cannot give this information except by your direction.

Mr. Lowenthal: I am asking, my lord, for the production of the extract from the Savings Bank account of Mrs. Dickman. I ask your lordship to direct me.

MR. JUSTICE COLERIDGE gave assent, and the witness gave evidence.

Mr. Lowenthal (to witness): That account shows the total amount of deposit between 1907 and 1910 to be £15 0s. 9d?—Yes; that is the balance standing to the credit on January 1, 1910. On January 5, £12 was drawn out; on February 1, £1; on February 16, £1; on March 14, 10s.; leaving a balance of 10s. 9d.?—Yes.

Mr. Mitchell Innes: This is the account of Mrs. Annie Dickman, of 1 Lily Avenue, Jesmond?—Yes.

And it goes without saying that these sums were drawn by the depositor?
—Yes.

INSPECTOR JAS. IRVING said he was in charge of the prisoner at the Moot Hall Police Court on April 14. That was the occasion when the evidence was given as to the finding of two pawn tickets. After evidence had been given, he removed the prisoner down to the cells; and prisoner made a statement. Prisoner said, "There is nothing in that evidence about the pawn tickets. When racing you get mixed up with the Bigg Market boys, and, after the season is over, they are always asking you for money. The one pair of field glasses were my own. The other pair I got from a friend, who owed me some money. I took them and pawned them myself, so that if any of the boys asked me for money I could pull out the pawn tickets, and say, 'Look here! This is what I am down to.' They think you are hard up."

Mr. Mitchell Innes: There is a small question of evidence I wish to be assured about. Did Spink, the clerk, say at Stannington on which side of the carriage the two men were sitting—was it the near side of the platform, or the further side?

MR. JUSTICE COLERIDGE (reading from his notes): He said, "Facing the engine on the far side." The companion was sitting facing the deceased."

THOMAS PAISLEY, treasurer of the Newcastle Co-operative Society, 103 Newgate Street, Newcastle, produced the books of that society showing the account of Mrs. Dickman, commencing May, 1904, and continuing up till March 17, 1910. On October 30, 1907, the sum of £73 17s. 2d. was standing to her credit. After that date there were three additions to capital. The withdrawals in 1909 became frequent, until, on March 17, 1910, there was credit balance of £4.

Mr. Mitchell Innes asked no questions.

Mr. Tindal Atkinson said that was the case for the Crown.

THE DEFENSE.

Mr. Mitchell Innes, for the defense, said that he would call no witnesses, but would put the prisoner himself into the witness box, and Dickman was conducted there by a warder. He was examined by *Lord William Percy*, as follows:

John Alexander Dickman, that is your name?—Yes, my lord.

Are you a married man?—I am.

Have you got any children?—A daughter and a son.

I think you have lived long in this city?—All my life.

Your address is 1 Lily Avenue?—Yes, it is now. I have lived in different places, but always in the neighborhood of Newcastle-on-Tyne.

I want to take your mind back to 1903 and to ask you some questions about that time. We have been told by one witness that you were secretary to a colliery company—I was secretary at that time to a syndicate that had purchased the colliery and royalty. A company was formed later.

Where was that colliery?—At Morpeth.

Who sold the colliery to the new company?—It was bought by the syndicate. I negotiated the sale to Messrs. Moore, Brown and Fletcher from Mr. Frank Christie.

In what year?—1905 or 1906. I think it was completed in 1906.

Were you secretary from 1903 to 1906?—I was.

Upon that sale did you get any commission?—From memory, I think I drew £500 or £550, and £150 given away.

About that time did any other money come to you?—I had a legacy left me. I think perhaps that was in 1905 or 1906 or later.

It was about that time at any rate?—Yes.

What was the legacy?—It was in bank shares in the Wiltshire and Dorsetshire banks. I think I got £220.

After leaving the employment of the colliery how did you get your living?—Well, I took a holiday, and I also occupied my time at racing occasionally, when it suited me.

You used to put money on races?—I did, considerable sums, sometimes as far as £100, £50, or £30.

Did you ever put money on for a witness who has come here named Christie?—I have.

And with bookmakers?—Yes, and also at the meetings.

That is what is called working on commission?—Yes; but there was nothing stated—no fixed amount.

Did you have an office at that time?—Yes, I had. I kept the old colliery office for some time, and then gave it up.

When?—About the end of the year. I had it on a yearly tenancy.

MR. JUSTICE COLERIDGE: Do you remember what year?—Perhaps 1907 or 1908. I do not know which year.

Lord William Percy: May I take it you had times that were sometimes good and sometimes bad?—I was always very fortunate. Of course I have had my bad periods.

Most betting men have bad periods?—Yes.

Do you know the witness Cohen?—Yes, the money lender.

Did you introduce anybody to him last November?—I did. I introduced Mr. Frank Christie.

And as a result of that introduction was any money lent by Cohen to Christie?—There was. £200.

Did you get any part of that £200?—Yes, I retained, as arranged by Mr. Christie, £150.

For what purpose was that arrangement entered into?—For betting transactions.

And did you in fact use it in that way?—At that time I did not. I had given up racing until the flat.

Was the betting successful with that £150?—No.

Eventually did you lose it?—Not the whole £150. I lost about £110 or so, and I lost some of my own money as well.

What happened to the balance of the £150?—I gave some to Mr. Christie

when he came to London. Altogether, I think he had about £78 or £80 of the £200.

I want to ask you about another witness, Hogg—do you know Mr. Hogg?—Very well; very intimately.

He is a contractor?—Yes.

Is he a contractor at your old colliery?—He did several contracts for the Morpeth Moor Colliery during the time I was secretary for it.

As a matter of fact it has changed its name now?—After it was sold the purchaser called it the Wansbeck Colliery Company.

Dovecot is not the same colliery?—Oh, no.

Was it on the same property?—No. Morpeth Moor royalty adjoins Pegswood; Dovecot is nearer to Stannington.

That was the way you got to know Hogg?—Yes.

Are there any new workings going on at Dovecot?—They are sinking a new shaft there nearer the road. There is also a drift about half way between Stannington or the Dovecot pit and Morpeth Station.

Was Christie in any way interested in these sinking operations?—He was, in fact, it was through my original introduction that Mr. Christie and Mr. Hogg took up and got this royalty.

In the early part of this year did you ever go to see Mr. Hogg?—I think I went on several occasions.

Was that in connection with the sinking operations that were taking place?—Not directly, but indirectly.

What was it for?—I went out to see him in regard to private work with Mr. Christie.

And Christie, you told us, was interested in the sinking?—He was; I wished to have information to give Mr. Hogg, information of a private nature.

Do you remember what the last time was when you went to see Mr. Hogg, before the 18th of March?—I do; it was the fortnight before.

That would be the 4th—Yes.

Did you in fact see him that day?—I did. He was coming into Morpeth and I got a ride in with him.

Did he drive you in?—He drove in, and I had a seat in his trap.

Was it your custom when you went to Mr. Hogg to make an arrangement?—Never. He was always glad to see me, and I was always glad to see him.

Coming to the 18th of March, at what time did you leave your house that morning?—I think it would be about 10 o'clock.

Do you remember what suit you had on that morning?—This suit I am wearing now, complete.

Is it not complete now?—I had not the same trousers on.

Had you that coat and waistcoat on?—Yes; and trousers to match.

What else?—My black boots, the same as I have on now, a flannel shirt, and, I think, I had a similar collar to this and a similar tie, a black hat, and brown overcoat, with a pair of brown gloves.

Is that coat here?—I have it down in my cell. When you left your house where did you go?—I just went to the end of the street, and got a car which stops at Fern avenue.

And then?—I got off at the foot of Northumberland Street and I walked down, intending to go to the Quay, thinking I had plenty time to make a call and come back for the 10:27 train; But, in going down Grey Street, I thought I would not have sufficient time, and I cut through the High Bridge for the Station and I arrived there early.

How did you enter the Station?—Underneath the main portico, which is where the tramcars stop, and through the booking hall entrance, and straight to the ticket office window.

When you got into the booking hall did you see anybody you knew?—I did not notice anyone.

When you went to the booking office?—As I went to the booking office the deceased man was walking away in the opposite direction. He said "Good morning," and I said, "Good morning," but if he had not spoken to me I would not have spoken to him.

Then did you buy a ticket?—Yes; I got a return ticket to Stannington.

Did you know this poor man Nisbet?—I have known him by sight for several years, but he was no companion of mine, and I was never intimate with him. I have never made a point of stopping to speak to him.

He was a casual acquaintance?—No; he was not an acquaintance. I knew he was on the Quay, but did not know what he was engaged in.

After having bought your ticket where did you go?—I went to the book-stall, and bought a Manchester "Sporting Chronicle."

And from there?—From there I went to the refreshment rooms as you go down to the Tynemouth platform, and I had some refreshment in there, and by that time it was about 20 past by that clock. I came out, and walked round to take my seat in the train, but whether I went through the No. 4 gate, and behind the cigar divan, or in front of it, I will not swear, but I went to the small urinal on No. 8 platform.

The urinal is at the junction, at the bottom of No. 5 and 6 platform, and part of it on No. 8?—Yes; it is only a small one.

You know it has been said here that you were seen by a witness walking with Nisbet along the passage, with the railing on one side, and the refreshment room on the right?—I never saw the deceased man again after he left the booking hall.

And you got your ticket just after him?—Yes; and to the best of my knowledge I was never in his company or near him after that.

You tell us whether you went in at No. 4, or in front of the cigar divan you went to the urinal?—Yes.

After that where did you go?—Through the connecting wing and took my seat in the train which was a good way up the platform.

After you had taken your seat what did you do?—I put my coat on the rack, which I had been carrying over my arm, and read my paper, looking at the racing notes. I read different parts of the paper, and had a look at the racing program on the journey.

Was there any racing news of importance that day?—Yes; it was the Grand National.

To a racing man was the information in that paper that morning interesting information?—It was indeed.

You got in and started reading your paper?—Yes; I read different notes, and looked at anything I thought would be of interest to me.

Do you remember the part of the train you got into?—It was very near the end of the train, and I think about two compartments away from a compartment which had a reserved ticket on the window. But which special or particular compartment I would not be able to definitely say, but it was close to that compartment.

You have told us your ticket was to Stannington?—Yes.

Did you notice the train drawing up at Stannington.—I did not. I don't think I noticed any station until I was surprised to find the train swerving, and then it was Morpeth.

Is there a swerve outside Morpeth?—There is.

I think that is a bend on the line that everybody who travels on the line will know well?—Yes.

It was that which arrested your attention?—Yes; that made me wake up, as it were.

When you arrived at Morpeth, what did you do?—I got my coat off the rack and opened the door, and I noticed some porters and luggage.

Where about did your carriage draw up?—A long way up the station, past the refreshment room, and towards the north end of the station.

What did you do?—I noticed a group of men shaking hands, or speaking to someone in this reserved compartment and I passed by them.

The way out is towards the south end?—Yes.

And did you give your ticket up?—Yes; I took it out of my waistcoat pocket, the whole ticket, and I gave it to the collector. I don't know whether I had my coat over my arm or shoulder. I put my hand into my waistcoat pocket and took out some coppers. By that time the man gave me the return half of my ticket and I said "2½d. is the correct fare difference," and gave him 2½d.

Did you go out of the station?—Yes; I considered whether to come back to Stannington or not, but I decided not to.

You knew there was a train?—Yes; but had I got out at Stannington, I should still have walked from Dovecot pit to Morpeth Station.

Was there something there?—Yes; I wanted particularly to see the drift, and see the class of coal they were getting out.

What is that drift?—It is a drift which delivers coal on to the Newcastle road, and it is about half way between Stannington and Morpeth.

Is it a landsale?—Yes.

Going back to Morpeth station, which way did you leave?—I went down the bank, the ordinary way out, and turned up the Newcastle road, the road between Newcastle and Morpeth.

To go down towards Stannington?—Yes, from Morpeth.

Down the main road, and then turn to the left?—No. You pass through Stannington; the main road goes through Stannington, but to go to the Dovecot you would turn off to the right.

How far did you go down the road?—Past some houses, and within sight of the drift.

How far is the drift from Morpeth Station?—I walked about half an hour.

Prisoner was handed a plan by his Lordship, and indicated on it the position of the drift, which he thought was between Catchburn and Clifton.

Lord William Percy: As you were going along the road what happened?—I took very ill. I had a very bad seizure, and I got over the hedge.

A seizure of what?—I thought it was diarrhœa. When I attempted to relieve myself, I could not. The fact that I was in a very unusual position, and the great amount of strain brought another complaint on. I did not tell Supt. Weddell about that because I did not wish to disclose my infirmities.

What is the other complaint?—Piles. I have been troubled with these for about twelve or fifteen years. While I have been in prison, I have been treated for them. I have ointment.

Going back to the field, what happened?—Well, I passed some water, and I felt slightly relieved, and I spread my coat out and lay down. I was very bad. I remember at Brampton, some time ago, I was bad from 9:30 right up to the dinner time.

How long do you think you lay down?—About half an hour. I got up and down.

What did you get up to do?—I thought I would try to relieve myself to put myself right.

And you could not?—No, I could not.

You got up; what did you do then?—I was in such a state that I thought it would be better to get back to Morpeth, and get the train home, and go and have myself put in proper order.

Then did you go back towards Morpeth station?—I did. But I didn't walk so quickly.

What time did you get to Morpeth?—It would be about 20 past 1 when I was on the platform. It might have been a little earlier. I went out at the east side of the station. I thought the express might have been late. When I have travelled for the Colliery Company, I have known the express late.

When does the express go?—About 10 or 12 minutes past 1.

You were a few minutes late for the express?—Yes, as it turned out to be. I went out into the station to cool off a little, and looked into the coal depot, to see if they were doing any business. I went up the bank as far as the auction mart.

When you left the station by the east side, did you meet anybody you knew?—No one that I knew. I did not take particular notice of anyone. The thought struck me to see Mr. Hogg, and I thought of the Newcastle Arms. In going down there I met Elliott and a friend. I stopped, and on the spur of the moment I asked him if he had any information about the big race.

Was that Sanderson?—Yes.

After stopping to speak to these two, I thought I had better return and catch the 1:40.

Did you get back in time for the 1:40 train?—Yes.

And did you take the 1:40 train back to Newcastle?—I did. I got into a compartment which was heated, and that greatly relieved me.

That was on the train going back to Newcastle?—Yes.

That is the 18th. I do not think we need have anything about the Saturday and the Sunday. Now, on the Monday did a detective come to see you at your house in the evening?—Yes, about 5 o'clock.

What did he say when he came in?—I think he asked me my name, or if I was Mr. Dickman. I said I was.

Then he asked you to go to the police station?—He asked me to come down and make a statement. I said I would. I went straight away, and my wife came in just as we went out.

Did you make that statement which has been read to the jury in this case?—Yes, to Mr. Weddell, who took it down. I did not go closely into details, but it is substantially correct.

When you were in the police station, were you dressed in the same clothes as you had been dressed in on the Friday?—I had this (pointing to the clothes he was wearing) complete light suit on.

Did you tell the police at the station they were not the same clothes?—I did. I said it was not the suit I had on the Friday, to Supt. Wilson, I think—a very stout gentleman.

Lord William Percy: Where are those trousers, produced in court yesterday?

An official handed up to the witness box the trousers, and Dickman, holding them up, said: "These were the trousers I was wearing on the Friday."

Lord William Percy: All the other clothes were left behind and handed to the police?—So far as I know. I suppose the police have gone all over my house, and made things into mince meat.

They have everything?—Everything so far as I know.

These are the trousers you were wearing on the Friday?—They are. This is the complete suit. The trousers match this coat.

What trousers were you wearing on the Monday, when you went to the police station?—On the Monday I changed myself completely.

Subsequently, do you remember the witness Hall being brought in at the police station?—Yes.

When Hall came into the room what happened?—I was standing about the middle of the men who were put up for the purpose of identification. He came forward and looked, and went up three or four times past the men. Then he walked away. There was a stout officer who sort of jokingly pushed him, and made him practically feel that he was saying, "You can't get out of here without making a selection." But the man was very reluctant to do so. If he had not practically intimidated him into doing so, he would not have done so.

Did you hear any actual words pass, or was it your impression?—That was my impression, and I also heard some words passed to the effect of what the witness stated. He was reluctant to make any choice whatever.

MR. JUSTICE COLERIDGE: The witness Hall has not stated anything amounting to intimidation.

It was the appearance, my Lord, the way Hall walked away after having viewed the rank three or four times—a policeman would get in his way, and would not allow him to pass—practically speaking, pushed him back. He sort of joked and cajoled him into making a selection.

Lord William Percy: You used the word intimidation. What do you mean?

It was almost amounting to force, to stop him from going away, and from the discussion I took it they were saying, "Well, you must make a selection. You must have something to do." That is the impression I had.

That is the impression you formed?—From the actions of that particular officer.

Mr. Tindal Atkinson: Who was the officer? Was it Mr. Weddell?—It was not Mr. Weddell. He was not there then.

Lord William Percy: Who were there? There were a lot of detectives, and a lot of officers. There was a policeman at the desk taking notes and so on.

I want to ask you about Miss Hyman; she keeps a newspaper shop in the Groat Market?—Yes.

And you have had communications sent there?—Yes; principally betting telegrams, and so on.

She has told me that there was a postcard addressed to "Black" asking for the return of a revolver?—Yes, I remember that postcard, and I got a letter at the same time.

What did you do with the parcel that postcard asked you to send back?—I sent it back. I was in about the middle of the week, and I think I sent it back on the Thursday or Friday. At any rate, I sent it back.

To what address?—Bell Brothers, Waterloo Street, Glasgow. I never opened it. Whether there was anything in it of a dangerous nature, I don't know. I know the postcard said they sent a pistol or revolver, but I wrote a postcard saying I had sent it back that particular day. I sent a parcel to Leeds at the same time, with a patent, for which I was trying to form a syndicate.

Did you get a label from Miss Hyman?—I got two labels; in fact, I think I bought a packet; and if I am not mistaken, I think I wrote the address in the shop.

When you were searched there were some things found on you?—I gave them up; I emptied my pockets.

I want to ask you a question or two about two things, one is the £17 9s. 11d. and the other is the canvas bag, the bag with "Lambton's Bank" on it. Had you an account with Lambton's Bank?—With Lambton and Co., of Grey Street; Yes.

For how long?—The bank book will show it.

Some years?—Seven or ten years.

How did you get the little canvas bag?—I got it possibly from that bank. I have drawn sums of money from nearly every bank in the town. I have had to cash cheques for different people.

Did you carry your money in it?—Yes; I used it instead of a purse.

It has been your custom to carry money in these bags?—Yes, for the last 20 years I have always used canvas bags. Anyone who knows me will tell you so.

With regard to what was in the bag?—I had 15 sovereigns there in reserve for a special purpose.

At the end of the racing season of 1909 what was your position as regards your betting account?—My betting account; I had a reserve fund of possibly nearly £120—£110 or £120—at the end of November. That was known only to myself.

What were you doing with that £120 during that time?—I gave my wife £50 before Christmas, and in the November these transactions had taken place with Mr. Christie, and I went to some meetings up in the South—jumping meetings.

You were using the £120 for current expenditure?—I was using part of my own money and part of Mr. Christie's.

In February, what was there left of that £120?—Of my own, £120. I had given my wife £50, and that left £70, and in different ways I would have, to go to the Waterloo Cup, about £40 of my own money.

MR. JUSTICE COLERIDGE: That was in March?—About the middle of February previous to the Waterloo Cup. There was none of Christie's money left then.

Lord William Percy: There was £17.—That was what I had left over of what I was going to the Waterloo Cup. I think I gave my wife £15 or £20.

MR. JUSTICE COLERIDGE: Out of what?

Lord William Percy: Out of the £120, my lord.

Lord William Percy: Were you keeping that money back for any particular purpose?—I was keeping that to start the flat racing with. £15 was quite sufficient for me to make a decent living with.

MR. JUSTICE COLERIDGE: You had £110 or £120. You gave your wife £50. That would reduce it to £50 or £60. In the middle of February you had £40. Did you give any of that to your wife?—£15 or £20 I gave my wife. That was when I had decided not to go to the Waterloo.

Lord William Percy: When you were charged at the police station with this crime did you answer to that charge thus, "I don't understand these proceedings. It is absurd for me to deny the charge because it is absurd to make it. I can only say I absolutely deny it?"—Yes, with the stress upon the "absurd," because I thought at the time it was a most absurd charge to have made against me.

Is that your position here today?—It is.

THE CROSS-EXAMINATION OF THE PRISONER.

The prisoner's examination in chief lasted 50 minutes. He was cross-examined by *Mr. Tindal Atkinson*.

He knew the deceased, but if he had been asked his name he could not have told it.

Did you not know his name?—No; If anyone had said to me, "Do you know Nisbet?" and had given me a description, I would have known the man.

You knew his name was Nisbet?—If I had been asked I would not have known.

MR. JUSTICE COLERIDGE: You knew the man and you knew his name?—Yes; if it had been mentioned to me.

Mr. Tindal Atkinson: Did you know his name independently of anybody telling you?—No.

On the 18th day of March did you know this man by name?—I did.

MR. JUSTICE COLERIDGE: And by sight?—By sight, I knew he was a Quay-sider.

Mr. Tindal Atkinson: Did you know what he was?—I knew he was a clerk on the Quay, but whom he was employed with, or where he was employed, I did not know.

Did you know he was a clerk and bookkeeper to a colliery company?—No, I did not—whether with a firm of merchants or ship brokers or general dealers, I was not aware of.

Dickman further said he had been connected with a colliery, and knew that wages were paid once a fortnight, on Fridays. He could not say in regard to any particular colliery that the wages were taken from the places of business in Newcastle to collieries in the neighborhood. He knew the money was drawn from the bank by cheque and carried by someone to the colliery, where the wages were paid. He had done the same himself. He went from Newcastle to Stannington on March 4. He selected a Friday because Mr. Hogg made certain payments on that day. He wanted to know whether Mr. Christie was supplying money to Mr. Hogg for the payment of wages, and whether Mr. Christie was bluffing him by saying he had no money.

Further cross-examined, the prisoner said he did not over-travel his station when he went to Stannington on the occasion referred to. He might have been reading a paper on that journey, but he could not say. He did not know Stobswood Colliery. He knew there were a good many collieries about Morpeth, and those he knew best were Pegswood, Morpeth Moor, Dovecot and one on the opposite side of the railway. He saw deceased on the morning of the 18th in the ticket hall of Newcastle Station, just as he was going away from the window. Deceased said, "Good morning." That was not the first time he had spoken to him. He saw him in the street on the day of Mr. Lloyd George's visit. He did not know deceased was in the employ of a colliery company. On March 18 he was in the third-class refreshment room in the station, and from there he went towards No. 4 gate.

Alone?—Alone.

Absolutely?—Yes, to the best of my knowledge and belief, I was.

Prisoner, continuing, said there was no one with him, but there might have been people about. He did not see the deceased after he left the ticket office. If deceased had walked through the No. 4 gate with him

he thought he must have seen him, but he remembered occasions when he had passed people he knew very well without seeing them.

Is it true or not that you were walking side by side with the deceased man—Yes or No?—That I could not say. I know I never saw him again. His mind was occupied with something very different that morning. He was not in anyone's company. He only knew Raven by seeing him as a witness at the trial, and had never seen him before.

He says he saw you passing side by side in the company with the deceased past No. 4 gate, and pass behind the cigar place in the direction of No. 5 platform. To the best of your knowledge, you say that is not true?—It could not have been, to my knowledge.

To the best of your knowledge is that not true?—It is quite possible I might have gone through the gate, but I was never in the deceased man's company.

On the Monday you made a statement. In that statement you said: "I went to the bookstall. I got a paper, the Manchester *Sporting Chronicle*," and then went to the refreshment room, and had a pie and a glass of ale. I then went on to the platform, and took my seat in a third-class carriage nearer the hinder end than the first."—That is so.

You did not mention the fact that you went to the urinal?—I was not aware they wanted such minute details, but merely a rough statement.

Do you know a man called Hepple?—I do; an artist.

Have you known him to speak to?—Yes; we are very old friends, and used to live together at Whickham.

He could not make a mistake about your identity?—He might, at his age.

Now, what do you mean?—He is not so young as he used to be. He is much failed now.

You mean to say he could not see you or appreciate it was you?—He might have made a mistake.

He says he saw you, eighteen feet away, pass him with another person, and he watched you and that other person proceed to the head of the train, when at last he saw one of you with your hand on the handle of the carriage?—From my knowledge of my own actions, I know he has made a mistake.

The whole of that is a mistake?—Yes.

Your companion, if not the deceased man—could you suggest who it was?—I had no companion.

You are positive of it?—Absolutely.

He says he saw you in the act of speaking to the man?—In that he is mistaken.

Is it also a mistake that you went to the front portion of the train?—It is; I would not have had time to go to the front end of the train.

What is the compartment you say you got into?—It would be the second or third or close to the compartment which had a reserved ticket upon the window, near to the guard's van.

The last coach that was traveling from Newcastle?—If we go from the

guard's van, it would be the carriage or coach next to the guard's van. I nearly got into the compartment next to the guard's van.

The last compartment in the train?—The last carriage or coach. There is a compartment next to the guard's van. I nearly got into that, but, in going past, I saw a compartment engaged and went past it.

You got into the last coach but one?—Do you call the guard's van a coach?

Yes?—Then it must be the last but one, so far as my knowledge goes.

Which compartment did you get into?—The coach next to the guard's van coach.

MR. JUSTICE COLERIDGE: The last coach but one to the train?—That would be it.

Mr. Tindal Atkinson: You got into the last compartment but one in that particular coach?—I think it was somewhere about the middle of the coach.

Do you know that Hepple says he was standing at the open door of the last compartment but one to the coach?—I do not.

If your story is true, you must have passed just round him, and got into a compartment just ahead of where he was standing?—That I don't know.

It must be right if I am right?—I never saw Hepple that day, and if I had seen him I would have traveled with him.

Were you wearing a fawn coat that day?—No.

If Hall says you were is he mistaken?—I don't think he referred to me as wearing a fawn coat. He referred to some individual.

At this stage, the prisoner asked that a brown overcoat be brought from the cells below, and, on this being produced, he said that was the one he was wearing on the day in question. It was not a Burberry coat. He had on his Burberry that night at the Pavilion. The fawn coat which had been produced in court was his. There were some five or six persons who traveled in the same compartment with him that morning, but he did not know them, or know at which station they got out. He thought there was someone sitting on either side of him.

Were they men or women?—I don't know. The treatment I have since received has made me forget it.

But you remembered minutely what you did up to that point?—Yes, but I was not making observations.

Your attention was called to the supreme importance of this matter three days after, and you cannot give us any further information than that?—I was not asked that particular question.

Do you know Mrs. Nisbet?—Just by eyesight.

Did you see her on the journey?—I did not.

You got out at Morpeth?—Yes.

You had meant to go to Stannington?—Yes.

Did you consider it a visit of importance?—Yes.

Continuing, prisoner said the 10:27 was a suitable train, as he wanted to be back at Newcastle in the afternoon. He was going to see Mr. Hogg that day, and had partly set out to see the drift. At Morpeth Station, he

had not his ticket or money in his hand as he left the train. He never saw the drift that day. When he was taken ill, he could not say whether it was a fence or gap in the hedge he got through into the field. He found himself in an ordinary grass field, on the right side of the road. He was ill several times, and it lasted half an hour. He got back to Morpeth at 13 minutes past one o'clock, and walked in the direction of the Newcastle Arms.

Prisoner, further cross-examined, said it took him about a couple of minutes to go out of Morpeth Station, past the coal depot, and to the top of the bank near to the auction mart. He had made himself hot with walking, as it did not take much to make him hot. He hurried, because it was his intention to catch the express train to Newcastle. He went home about 4:15 or a quarter to 5, and he went out after tea. He went straight home about 9:30 from the Pavilion. He was out on the Sunday afternoon and night. He went down to the Turk's Head Hotel. He was feeling better.

Do you know this shaft at the Isabella Pit?—I do not.

Do you know where it is?—I do not.

Do you know to whom it belongs?—I do not.

Prisoner went on to say that he might have passed the pit and not known it. He had been about twice along that road where it was stated to be. He did not know the Hepscott Colliery. He did not know there was a shaft close to the road. He knew the witness Spooner, who used to be manager for them. He did not know of difficulties in working the pit he (Spooner) had to do with.

MR. JUSTICE COLERIDGE: Did you know that he was connected with the Isabella Pit?—I never knew it by that name.

Mr. Tindal Atkinson: Do you know the Hepscott Colliery?—Yes, I know it is at the east side of Morpeth Station along what was called the Blyth Road.

And you have passed along that road?—Only on two occasions.

Further cross-examined, Dickman said he could not account for the bloodstain on the Suede glove. He discarded the use of those particular gloves for a good long period. He bought then, also a brown pair. He used the Suedes at the time on week days, and the brown ones on Sundays. He then wore the brown gloves constantly because the Suedes were bad fitting.

Can you account for the blood found on them?—Not unless my nose had been bleeding, and I touched it with my hand. He might have caught his trousers pockets when putting his hand in, or it might have been done when he was cutting his corns. He had very frequent bleedings to the nose in the mornings.

But you would not wear your gloves then?—No.

What about this stain upon your coat?—I think it was got by the bicycle oil, when I was preparing a patent roller bearing.

Prisoner further cross-examined, said he had from £110 to £120 as the result of the flat racing season. That was at the end of November. He thought it had been gradually increasing over the whole of the year. His

object in going to Cohen for a loan was to see if it was possible to obtain loans at the advertised rates, and for no other purpose.

MR. JUSTICE COLERIDGE: You did not want the money?—I did not, my lord.

Prisoner added that he took the loan after due consideration, and spent the money. But he certainly was not hard-up. It was not a large amount to pay, 5s. a week interest on the loan. He was not going to pay it off until the end of six months. He did not wish to borrow money for himself; he had sufficient for his own purpose. As to the articles of jewelry left for the £5 at a jeweler's, he said he wished them to be in a safe place, as there had been burglaries in his neighborhood. He intended to go to see the Waterloo Cup, but he did not go. His banking accounts were not closed, but only lying dormant. His wife had often money in reserve that he knew nothing about. He had never been pressed for rates while he had been a tenant.

Answering *Mr. Mitchell Innes*, prisoner said he now made the same statement as he did to the police—that people entered and left the compartment at different stations on the journey. There were better trains, express, from Morpeth, than from Stannington. He did not think any of his family had been wearing his suede gloves since he discarded them. He might have led his wife to believe he was short of money merely to keep expenses down. His wife never complained to him that she wanted money. She had a reserve fund in the stores in her own name.

Mr. Tindal Atkinson elicited from prisoner that there was a letter in his wife's writing which counsel read, and, which was to the effect that Mrs. Dickman expressed sorrow that he (Dickman) had no money. The final notice for the rates had come in. These must be paid before Thursday. There was also Harry's school account. "With my dividend due this week," added the wife, "and what is in the post office, I dare say it will pay the most pressing things, but it is going to make the question of living a poser unless you can give me some advice as to what to do." Prisoner said his wife and he often had bickerings as to little accounts.

THE SPEECH FOR THE CROWN.

This being the whole case for the defense, no witnesses being called, *Mr. Tindal Atkinson, K. C.*, at five minutes after four o'clock in the afternoon began his speech for the Crown.

The prisoner, he said, had gone into the witness box, and they had had an opportunity of hearing his history of the case, and his attempt to explain the circumstances that had been laid before them on the part of the prosecution, and to show, if he could, that he was innocent of the charge. They had had an opportunity of watching him, seeing his demeanor, and of listening to the statements he had made. To a large extent, where the ring closed more closely than ever around him, the accused had contented himself with a flat denial of some of the principal facts sworn to

by the witnesses for the prosecution. They would have to make up their minds which they would believe. The deceased was seen alive and well at Stannington. Was he alive at Morpeth? If they believed the evidence of Grant, the man must have been underneath the seat, murdered. It seemed clear that the murder took place between Stannington and Morpeth. Who was the man? There appeared from all the evidence to have been only one man in the compartment with the deceased from the time the train started at Newcastle. Whoever that man was, he must have been the murderer, and he thought they would come to the conclusion that the murderer, whoever he was, got out at Morpeth. If they were satisfied that the prisoner was the man who accompanied the deceased along the train and got into the carriage with deceased, then they would have gone a long way in coming to a conclusive opinion of his guilt.

Counsel proceeded to comment at length on the evidence of the witnesses for the Crown, and said no evidence had been called to account for the actions of the prisoner between his arrival at Morpeth at 11:12 and the next two hours. They had only his own statements. Did they believe it? He had chosen to tell falsehoods with regard to the earlier part of his connection with the case?—Did they believe the statements he made as to what he was engaged in during these two hours? He made these journeys to Stannington on Fridays, when the money was taken from Newcastle to the collieries. He was there on the fourth, exactly a fortnight before. It was possible, and the facts seemed to show that it might be probable, that if he had made up his mind as to his financial position being desperate, he had to search for money and get money somehow. It was possible that he took that journey on March 4 for the purpose of seeing whether it would be possible to obtain some of the money that was being carried. The suggestion of the prosecution was that the two hours spent by the prisoner at Morpeth were occupied in getting rid of the bag which contained the money. Had he that bag when he left Morpeth Station? That was a question they would have to ask themselves. If he had not, he could not be the murderer.

That bag, as they knew, had been found ripped open, and must have been carried from Morpeth by somebody in the compartment in which the murdered man was. The suggestion of the prosecution was that he took the highroad which led past the Isabella Pit, and, having got so far as that, there came this apparent easy way of disposing of this bag. There was this apparently disused shaft with an iron cage over it, under which he could have thrown the bag, or pushed it through the space between the iron bars. So the bag was discovered there, with all the gold and silver taken out. One of the curious features in this case was that two pistols were used. There were two different pistols, and, according to the gunsmith, the bullets must have been fired from two different weapons. Whoever committed the murder must have used two pistols. The automatic pistol was comparatively flat, and short in length, and could be easily put into the trousers or coat pocket. What was the other pistol he did not know. Whoever committed the murder might have thought it was necessary to have two pistols to complete this ghastly act of murder. He

must have thought it necessary, to commit this brutal act, to use two of them, in order to secure the death of the man he intended to rob. Robbery was the motive of this murder. Money was to be obtained by the murderer after he had killed his victim; now they approached the question which threw some light upon the motive for committing this act.

Counsel dealt with the prisoner's financial position, and said the evidence showed conclusively that the prisoner was in urgent need of the money at the time this murder was committed; and there had been no satisfactory evidence given to the court of the possession of the large sum of money on the prisoner at the time of the arrest. It was, concluded counsel, a case of extreme importance, not only to the prisoner, but to the public at large. It was the sort of crime that would spread a certain amount of terror amongst the community, if they supposed people were not safe to travel in a railway carriage with another; but the verdict of the jury was to be given on evidence, and evidence alone; and, of course, he need not remind them that they must not find a verdict against the prisoner unless they were satisfied beyond all doubt that he was the person who committed the deed.

THE SPEECH FOR THE DEFENSE.

Mr. Mitchell Innes, K. C., rose at 5:10 p. m. to address the jury on behalf of the prisoner and spoke for one hour and thirty minutes.

He was afraid, he said, he must ask them to listen to him for some considerable time, and he felt that they must by now be almost exhausted by this case. He thought, however, he could claim their patient attention, as he would remind them that was the first, as it was the last, time he should have the opportunity of addressing them on behalf of the prisoner. His learned friend, Mr. Tindal Atkinson, in his concluding observations, appealed to them not to allow any extraneous considerations to weigh with them in coming to a conclusion in this case. He believed that they would not turn a deaf ear to that appeal. It would be idle for him to pretend that he did not know this case had excited a peculiar amount of public attention, and had been the center of a great deal of public gossip and comment—most of it idle, all of it almost ignorant in the highest degree. It would be idle for him to pretend he did not know it. And there were good reasons for it. The manner of the perpetration of the crime, the place of its perpetration, in a railway carriage upon a main line thronged daily by passengers in this north country, were features in it, and, besides, the evidence upon which this case reposed was difficult and voluminous.

Whatever features there might be in the case, they must pay the most earnest attention to the evidence, and to the evidence alone, which had been laid before them. He rejoiced to believe that that was their attitude in this case, for, whatever had been said or thought outside about the case, there in that place they stood in very different and far higher grounds.

There, as their consciences would tell them, neither gossip nor prejudice might enter; there irresponsible babble was silent; there was there no voice but the voice of the law, reminding them that upon their word hung the life of a fellow creature, reminding them that upon them was laid the double duty, the vindication of the innocent, no less than the conviction of the guilty, and reminding them that those who made a charge, before a conviction must follow, must bring proof of that charge; proof that destroyed all reasonable doubt in their minds as to the guilt. That was a matter they had to address their minds to. Proof. Had the proof or anything like it been given in that case. There was another feature which he ventured to say was most remarkable, and it was this, that a very large portion of the evidence, indispensable as the ground work for that case, was furnished by the deliberate statement of the prisoner himself, not from any inference drawn from what he had said, or done, but from his deliberate statement put in evidence that day by the prosecution against him. That statement was made freely, openly, and readily of matters, many of them unknown to the police at the time they were made, matters which, some of them, they could not have proved at all except by the statement that the prisoner made. He wanted them to remember that because he thought it gave some color favorable to the prisoner. He wished them to keep that in their minds when they came to consider the facts. What were the facts which he referred to, of which the police were ignorant; necessary facts for the prosecution of that case, some of which, at any rate, had been verified, and many of which, with the exception to which he would refer, had been accepted by the prosecution, and put forward against the prisoner. Let him read them a list of the things which the prisoner said on the 21st of March to Superintendent Weddell, and which had been used against him, and which had been either verified or accepted as true. Firstly, that he knew Nisbet; secondly, that he exchanged greetings with him; thirdly, that he was going to Stannington, although his statement was the only evidence; fourthly, that the train passed Stannington; fifth, that he got out at Morpeth. The only evidence as to that was that of Athey, the ticket collector, because although it was admitted now that prisoner was the man, Athey was not willing to swear that he was the man.

Consequently the direct, and conclusive evidence that he got out at Morpeth was the evidence of himself. Next was the statement that he met a man called Elliott, and spoke to him. That fact again had been verified. There was no doubt about it, and about the rational and quiet way in which the prisoner spoke on that occasion. There were three facts, two of them referred to in that statement, and one of them outside it, and which, perhaps, formed the main grounds of difference and of difficulty as between the prosecution and the prisoner in that case. It was not accepted by them that he got into the hinder part of the train, and it was not accepted that he went by Stannington by mistake. They said it was to murder the man that he went by Stannington by design. It was not accepted by the prosecution, in fact, it was vigorously denied that the prisoner's account of what happened to him in Morpeth was true. They

had now to deal with the first two questions—whether he got into the hinder compartment, and went by Stannington in mistake. There was no doubt a direct conflict of evidence as to whether the prisoner and Nisbet walked together side by side on the platform, and counsel suggested that there might be something in what the prisoner said that if he had been walking alongside Nisbet he did not know that it was so, was not conscious of the fact. As to Hepple there was not the slightest doubt there was a collision of fact on the point as to whether the prisoner had ever gone to the front of the train, but it was for the jury to say whether they thought it was not possible for Hepple to have made a mistake.

Hepple, no doubt, believed what he said to be true; but did he make a mistake? Hepple never saw either of the men he spoke to enter the carriage, and the burden lay upon the prosecution with regard to the other evidence, to put the prisoner into the carriage.

Counsel wished the jury to consider carefully the development of Mrs. Nisbet's identification. After dealing with her statements, he asked, with every respect and sympathy, if they trusted the identification that had been given by Mrs. Nisbet. It had been largely founded on a glance where there was a shadow over the seat of the carriage, and also upon a spasm of emotion acting upon a mind weakened by suffering and distress, and was no identification at all. It was a curious thing, in this case, that two witnesses seemed to have identified this man under circumstances which, he ventured to think, ought to make them hesitate a very long time before they accepted it as evidence of the identification of the prisoner. Two bad identifications, he submitted, did not make a good one; and they could multiply bad identification by the dozen, but they could not get a good one out of them. They still remained bad. The theory of the prosecution was that this murder took place between Stannington and Morpeth, and a number of witnesses had been called to speak to stations where no one had been seen in the compartment, and where people had left the train who could not possibly be associated with the crime. Whoever was the murderer, he submitted, would have got out of that train at the first possible opportunity. Where was the first possible opportunity that a man could get out of this train, if he had committed this atrocious murder after leaving Stannington. Might he suggest that the murderer got out of the train between Stannington and Morpeth? This was a slow train, a train which stopped every four minutes or so. He agreed absolutely that a man would be mad, from his own point of view, if, having done this terrible thing in this carriage, he traveled on to a station of the importance of Morpeth, with the body of his victim under the seat, and the floor and the cushions of the carriage dripping with blood like a shambles. A man with the reeking witness of his crime locked up in the carriage would have escaped from it as soon as he could. A remarkable thing was that two pistols were used; and he suggested that there were two murderers. There was no evidence of the blood on the clothes being human, and he ventured to suggest that, so far as the evidence of murder was concerned, there was absolutely no weight at all to be attached to the smear of blood on the thumb of prisoner's glove.

A murderer would never have gone back to Morpeth at all; and, if they considered this man's behavior as being the murderer, it seemed to him absolutely inexplicable. Having regard to the fact that the bag was found in June, in a mine regularly examined, he suggested that it had been thrown down during the time Dickman was in prison. It was ludicrous to say that the Dickmans were so completely without money that he could have been driven to commit a crime like this, as Mrs. Dickman was in possession of £32 in the Co-operative Store and in the savings bank, at the time the letter referring to money matters had been written, and Dickman's reply was a very fair one on the point that there was some little friction between them as to who was to pay for certain things. The statement of the prisoner was that of a man on trial for his life, with his back to the wall, if they liked; but it was a statement made by the man to the police. He claimed it in his favor to say that when he could have withheld facts he told a police ignorant at the time of the direct facts absolutely necessary for the foundation of the case, and which were presented there as direct evidence on these facts—facts without which this prosecution would at any rate have been in grave danger and difficulty, if it could have been got up at all.

The Court rose at 6:30 p. m.

The Court resumed its sitting at 10:30 a. m. and just as soon as the jury were seated in the box, Lord Coleridge began his charge.

THE JUDGE'S CHARGE.

MR. JUSTICE COLERIDGE: Gentleman of the jury. The prisoner is indicted for the wilful murder of Nisbet on the 18th March in this year. However long many of you may live, you will never have a more anxious and critical task than is placed before you today. The prosecution allege, and undertake to prove, that the prisoner is the man who is the author of the death of the deceased.

At the outset, I should like to mention, and dispose of, the question of the prisoner's means. It is quite inaccurate to say that it is necessary in the case of a crime to prove the motive. Many crimes are committed apparently without motive. Many are committed with what appears to be an inadequate motive, but if the facts are clear, the motive is immaterial. If the facts in this case were abundantly clear, it would not be wise for you to seek about to find a motive, but the prosecution allege that there was in the case of the prisoner an adequate motive. They say that plunder was the motive, and the only motive, for this crime. It is not alleged that the deceased man had any enemy; that he had done anything to mark him out for private vengeance, and it is in the fact that he was in possession of a large sum of money that you see the reason or motive for the crime which undoubtedly was committed. If the prisoner had been a man of ample means, and if the facts were clear and proved that he

was the author of the crime, the apparent absence of motive would be immaterial.

But here the prosecution allege that if you are to ask for motive, if you think that the nature of the case requires that a motive should be put forward to explain the crime, then the prosecution say that the prisoner was in want of money. He was, some years ago, it appears, in a good position. He was the secretary of a colliery, and at that time it seems that he had received a substantial sum when that colliery was converted into some other company into the nature of which we need not inquire. But the prosecution allege that towards the end of last year, and throughout this year, there is evidence from which, if you believe it, you may draw conclusions, that the prisoner was in want of money. It appears that some time ago, towards the end of last year, he asked a witness who has been called of the name of Swinney for a loan of £10. The loan was refused; but in the asking of that loan, the prosecution say you may assume that the loan was necessary. Again, in October of last year, it appears that he was in business relations with a money-lender, a money-lender of the name of Cohen, and that he gave a bill or promissory note or some document of the kind, or at any rate he entered into a legal obligation, in consideration of the loan to him of £20, to pay the ample, some may think exorbitant, interest of £1 a month, which is equal to 60 per cent per annum. That loan he had, as far as I know, up to the crucial date of the 18th March, never paid off. He had paid regularly this interest, and the last payment of the interest was the day before the murder. The loan was granted for a period of three months, and at the end of three months, it was represented to Mr. Cohen, or his representatives, that he was unable to repay the principal, and another period of three months was allowed to be given, which, as I say, had not terminated at the time of the murder, and did not terminate, I think, until the month of May or June, and the last payment of the interest was made on the 17th March. The prisoner's explanation of that is that he entered into this obligation by way of an experiment to decide for himself, and I presume in the interests of the public, or the assumed interests of the public, whether or not this particular money-lender would be ready and willing to perform the obligations which he set forth in some advertisement of his. If that was his desire, his desire would have been satisfied the instant the loan was granted, and there would certainly have been no desire on his part to refrain from repaying the capital at the end of the first period of three months; and it does not seem consistent, with his conduct to accept that as the only explanation of the obtaining of this loan. Then, again, we have it that, on the 14th February, I think it was, in this year, he went to a jeweler's, and there he pawned some jewelry of some value, a ring set with brilliants, studs, links, for the sum of £5. Those articles still remain to this hour in the custody of the person with whom he had pledged them, the prosecution say, giving evidence that the repayment of the £5 was difficult, if not impossible, on the part of the prisoner. Then we have the tripartite transaction between the prisoner, Mr. Christy, and Mr. Cohen. The result seems to have been that a sum of £200 was lent by

Cohen to Christy, of which undoubtedly some portion, it is a little indefinite what portion, Christy puts it at about half, but it is not quite clear how much, seems to have remained with the prisoner for the purpose of carrying on some mutual betting transactions which apparently failed. So far as I gather, with the exception of two smaller incidents, that concludes the evidence in regard to the prisoner's financial position. There are two or three other incidents. He appears to have pawned on the 1st March a pair of field glasses with a man of the name of Wilson, and the day before the murder he appears to have pawned another pair of field glasses with Messrs. Somerfield for the sum of 15/—those pawn tickets being if I remember aright, discovered among his papers. He pawned them not in his own name but in a fictitious name at a fictitious address, not that there is no such address, but that he did not live at it. He gave the name of John Wilkinson, 180 Westmoreland Road, Newcastle, a name that was not his, and an address at which he certainly never lived. Those field glasses, at the time of the murder, were not in his possession, because they had never been redeemed.

Such are the facts with regard to what I may call the outward incidents of his financial position. It has not been suggested that he had more than two banking accounts. One was a banking account in the National Provincial Bank, which was closed with a debit of 3/—. The other was a banking account with Lloyds Bank, which, at the end of 1909, had been either closed, or, at any rate all transactions were at an end in regard to it, with an even balance. That was his financial position, so far as he was concerned. His wife had two funds in which some money seems to have remained. When I say remained, I mean to infer that at one time those resources had shown a far larger amount standing to the credit of the prisoner's wife than they did at the time and the dates when the matter is important, March, 1910. The Post Office Savings Bank shewed on the 14th March, a few days before the murder, a balance of 10/9. The Co-operative Society, in which she had some money, shewed on the 17th March a credit of £4, so that if we may take £5, or £6, or £7, so far as the evidence is concerned on documents, that seems to have been the only available resources of the prisoner. He says, and it is for you entirely to trust or not to trust to the accuracy of his account, that towards the end of last year he had been successful, though he had had his ups and downs, in his betting speculations. He avers that he still had, if I gather him aright, an available income, when I say income I mean an available capital, of something like £40 at the time that the murder was committed. For that, I am not saying that you ought not to believe it for that reason, it may be that the necessary facts and surroundings of the case prevent any further evidence upon the point, evidence which documents could discover, but it is a fact, of course, that upon that we have no testimony but his own, testimony not independent, but, as I say you must not take it that that is conclusive against him. It may be that the circumstances of the case forbid the possibility of any further evidence on the point; but at any rate it is the fact that we have only his own uncorroborated testimony of the existence of that £40 or £50 or

whatever the exact amount may be in his pocket available at the time of the committal of the murder.

There is this particular item of evidence which has still further to be brought to your attention and that is a letter which was written by the prisoner's wife to the prisoner on the 25th January, 1910. That letter has been read to you and you will recollect its terms. It is a letter which is all about money and contains the expression that if further money is not forthcoming, "How to live will be a poser." The suggestion on the other side is that the wife and the husband were at odds as to from what fund the money for necessary household expenses should be drawn. She was demanding that he should meet them, and he was demanding that she should meet them, and that she could meet them if she would, because, at that time, the circumstances were slightly different from the circumstances in March, 1910, inasmuch as in the Co-operative Society she had some £15, or £17, I forget exactly the amount, and in the Post Office Savings Bank she had a sum of £3.9.0, which would come to something under £20. You have heard the arguments in relation to that. The arguments may have put a different complexion on that if you think they are of weight.

Mr. Lowenthal: There is one slight error. Mrs. Dickman had in the Post Office Savings Bank in January, £15.

Mr. Justice Coleridge: You will forgive me, Mr. Lowenthal, I think I am right.

Mr. Lowenthal: My friend asked me to correct it.

Mr. Justice Coleridge: I know it was so stated.

Mr. Lowenthal: Then we are wrong.

Mr. Justice Coleridge: If you just look at it, I think you will find that on the 25th January the balance was £3.9.0.

Mr. Lowenthal: I think that is right, and I beg pardon for interposing.

Mr. Justice Coleridge: Will you ascertain whether I am right?

Mr. Lowenthal: Yes, it is 1st January.

Mr. Justice Coleridge: I agree that was so, on the 1st January; but the 25th was the date on which the letter was written. I may say, in passing, if I make any error in any statement of fact I only hope I shall be corrected. I desire to be correct in every particular.

Mr. Lowenthal: I know your Lordship does.

Mr. Justice Coleridge: I think I have dealt with that portion of the case. As I say, if the facts are clear, the motive is irrelevant. If the facts are not clear, motive may explain what otherwise would be difficult of explanation. Upon those facts, you must make up your mind aye or no, whether or not you think, on the whole, the prisoner on the 18th March was in a position in which the sum of £370 was a most valuable acquisition. Now, gentlemen, I have dealt with that, and I shall not recur to it.

The next point to be dealt with is this. Who was the deceased? The deceased was a man who was in the employment of the Stobswood Colliery at Widdrington. His duty as such clerk was on every alternate Friday to

go to the bank in Newcastle to cash the cheque that was given to him by his employers and to take the money to the Colliery at Widdrington for the purpose of paying the necessary wages. That this was a practice known to the prisoner seems to be beyond doubt. He knew it; he had been connected with a colliery before; and he does not dispute not that he knew that the deceased was going on that day, but he does not dispute that that was a practice with which he was familiar, a general practice. On the 18th March the deceased followed his usual practice. He went to Lloyds Bank at Newcastle with a cheque for £370.9.6, and he went there with the black bag that you have seen as one of the exhibits in this case. At the bank he duly changed the cheque. He changed the cheque into the following coins: 231 sovereigns, 206 half sovereigns, £35.9.0 in silver and £1 in copper. The gold he put into three canvas bags. Those canvas bags were bags which were used by the bank for this very purpose. As the bank had changed its nomenclature more than once, there were three kinds of bags stamped in three different ways in use at the bank in March of this year. We need not trouble about the other two forms of bags, but there were bags stamped "Lambtons" in use at the bank at this time. The silver was put into paper bags, and the copper into a brown paper parcel or parcels. Having done that, the deceased proceeded, and there is no doubt about that, to catch the 10:27 train at Newcastle. He could not have traveled alone, because he was murdered before he got to Widdrington. I do not suppose there exists a human being who has listened to this case who doubts that he was murdered by a companion, somebody who traveled in the carriage with him. The prosecution undertake to prove that the prisoner was that companion. If they prove the prisoner was his companion on that day, and therefore in the same compartment with him, I should think you will be of opinion that the crime against the prisoner was proved beyond all possible doubt. The question is have they proved that fact, or have they not? They may prove it by direct evidence, they may prove it by circumstantial evidence, and proof by circumstantial evidence may often be as conclusive as proof by direct evidence. It all depends on the force, the variety, the independence, of the circumstances all pointing or not pointing, in one direction. Now the prisoner has made a statement, and in regard to that statement it is perfectly plain that the prisoner did travel by the same train; that he got in at Newcastle, at 10:27 and that he got out at Morpeth at 11:10. Did he see the deceased? He says he did. He saw the deceased, who took his ticket just before he did. That is his statement. But he says that, after seeing the deceased take his ticket in the booking office, so far as he was concerned the deceased disappeared from view, and he never saw him again. If that be true, it is clear that he could not have been the author of his death. He says he went to the refreshment room, a matter which is not disputed. He says he had a pie and some beer, a matter which is quite irrelevant. It does not matter one way or the other. Then he says he went to a urinal which is situated at the edge of No. 8 platform. To get to that, even if he went to it, he would have to pass down the platform which goes ultimately to No. 4 gate.

He says he walked down unaccompanied, not knowing anybody, not recognizing anybody, in conversation with nobody, and that from the urinal he took his seat on number 5 platform in the train, but to the rear of the train. Inasmuch as it has been proved that the deceased was murdered in the third compartment of the first coach, it is clear that if that account be true, someone else must be the author of the death of the deceased. Gentlemen, is that or is that not correct? Again I say we have the testimony of the prisoner alone. But again I warn you that there are many many occasions on which the testimony of the prisoner alone can be given. It would be unfair to say because there is nothing but the testimony of the prisoner to support it, that therefore it is not to be believed. There may be circumstances under which it would be impossible if not unlikely, unlikely if not impossible, that he could, having regard to the circumstances, produce any corroboration. Therefore, the bare fact that his statement is uncorroborated ought not of itself to militate against the truth. Then, is it true, and that is what we have to ask ourselves.

First of all, we have a witness of the name of Raven against whose character and against whose competence whether from age, or sight, or hearing, or recollection, no serious attack has been made. Well we have the witness Raven, who knew both of them, both the prisoner and the deceased. He knew them, at any rate either by sight, or by name, or both. The name does not really matter. He knew them both by sight, and he stood on a particular spot which has been marked by himself upon the map. As you, gentlemen, have not seen the map, I would be obliged if you would take it and look at the cross upon that photograph which indicates the position (His Lordship handed the photo to the jury) in which Raven has placed himself as he stood with his face towards the refreshment room. Standing there, he says this: "There were not many people there. I saw the deceased and the prisoner together walking along together." He would have you to understand not as strangers who happened to be walking alongside of each other, but in the way in which two persons who have some sort of intercourse, some sort of knowledge of each other, some sort of companionship, would walk. They were coming towards him. They turned in the direction of No. 4 platform. They passed in at No. 4 gate and passed behind the cigar divan which is there situated, which, on passing through, would enable them to reach the necessary platform No. 5. "After they passed behind this divan I saw them no more." Can you trust Mr. Raven's observation? If Mr. Raven's observation be correct, he saw an account of the tragedy in the papers the same afternoon, so that his attention was called to this fact hot-foot upon the observation which he made, he tells you what he saw, is it or is it not consistent with the prisoner's account? That is a matter which you, not I, have to determine for yourselves.

The next witness was the witness Hepple. Hepple was a man who had known the prisoner for 20 years, and could not, if he was sober, and had his wits about him, make a mistake with regard to the prisoner unless the prisoner has a double. He says that he went onto No. 2 platform, and that he selected a compartment. That compartment has been ascer-

tained by one of those strange little facts which are so conclusive. He recollects that in that compartment there was a photograph of Brancepeth Castle. The train has been searched and the only compartment which has a photograph of Brancepeth Castle is the last compartment of the third coach. If you look at that photograph, you will see the figure of the witness Hepple standing outside the compartment which contains the photograph of Brancepeth Castle and in which undoubtedly he traveled that day. Hepple, though he knew the prisoner and had known him for twenty years, did not know the deceased by sight, but, standing and walking, as he did until the train left the platform, to and fro three or four paces each way, waiting for the train to go off, he noticed the prisoner, and the prisoner passed him, and the prisoner went on towards the head of the train. If the prisoner did not repass him, his evidence is inconsistent with the prisoner's account: that he took his seat in the rear of the train. Not only so, but he says that the prisoner was in company with a companion, and although the companion was unknown to him he says his companion was a slightly built man, and from the evidence which we have in the case, as compared with the prisoner, it appears that the deceased was a slightly built man. They walked past him in the direction of the engine. He took a turn, and while he took that turn his back was turned towards them. But he saw this. The train was just about to start, and he saw one of them, they being still in companionship, that is the prisoner and the other man, with his hand on the handle of a door a long way up the train. Which particular door that was, of course, he could not tell. It is a matter, more or less of guesswork, to place the exact position of the door; but it is hardly a matter of guesswork to say whether it was a good way on in front or whether it was close to him, or to the rear of him. Some time afterwards, an experiment was made. The train was drawn up in the same place. Hepple stood at the door of the same compartment in which he had traveled. He was asked by the detectives, or porters, or whoever they may be, to walk slowly in the direction of the engine, and he would signal to them when they came to a spot about as far off as where he had seen these two men, of whom the prisoner was one, with a hand upon a door just before the train started. They walked slowly, turned backwards, walked with their back towards the engine, and, singularly enough, when they got within a foot or two of the carriage in which the deceased undoubtedly traveled, the signal was given by Hepple that that was the approximate distance from him. Gentlemen, the only observation I have to make upon that is this. Persons may of course, make mistakes about small matters; and if a person is particularly accurate in a particularly small matter, I should say that such evidence was rather doubtful, because persons are very often proud of their accuracy in proportion to their inaccuracy. But there are two features in regard to Hepple's evidence which are not features which can be characterized as small pieces of accuracy. One is, did the prisoner get into the train, broadly speaking, a good way off in front of him, or close to him to the rear? That is not a minute piece of accuracy, that is a matter of general observation. If he got into the train anywhere near where Hepple says he saw

him in the act of getting in; then it is clear that the prisoner is wrong when he says that he traveled to the rear of the train. If Hepple is accurate in saying that the prisoner was accompanied by a companion in the sense that he was obviously talking to him, and obviously known to him and walking in company with another man, and if the result of his observation leads you to conclude that the prisoner and the other man, whoever it was, got into the same compartment, whichever it was, to travel together, then it is clear that the prisoner's account cannot be relied on when he says that alone he walked up that platform, unaccompanied, and so far as any companionship was concerned he traveled alone to Morpeth.

Gentlemen, the next witness is a witness of the name of Hall. I might say, in passing, that it seems to me to be fairly accurately, proved that the first compartment in the first coach was a smoker, because in that compartment traveled the witness Bruce with another man. Bruce was traveling from Newcastle to Alnmouth, and Hall, whose accuracy has been impugned, says and corroborates Bruce that the first compartment was a smoker. It is clear that the prisoner did not travel in that compartment because Bruce was in it with another man, certainly not the prisoner. Did he travel in the second compartment of the first coach? Clearly not, because Hall was in the second compartment of the first coach, and in that compartment he traveled with Spink. As I gather Hall and Spink were on the same errand as the deceased, only happily the man who carried the bag, whichever it was, was accompanied and not unaccompanied. Perhaps, if the poor man into whose death we are inquiring, had had a companion, this would not have happened. However that may be, Hall knew the deceased. Hall traveled in the next compartment to the compartment in which the murder was committed. He traveled in the second compartment of the first coach, and the deceased traveled in the third compartment of the first coach. Hall knew the deceased. He did not know, up to that time, the prisoner, but he saw the deceased, and he saw another man came along right up to the first coach. The deceased and this other man were in conversation, so no doubt could exist in his mind that the deceased had a companion, somebody with whom he was talking and with whom he was walking. What is the evidence as to that other man? If that other man got into that compartment as the deceased's companion, no one could doubt that he was the author of the deceased's death. Who was it? He was a man who had on a light fawn overcoat, so says Hall. On the 21st March, that is, three days afterwards, Hall was taken to the police station. That took place at the police station about which we have heard so much, but not too much. He was taken to the police station, and he was there confronted with nine other men. Of these nine other men the prisoner was one. Now, there are some persons, as I have said, who are so proud of their accuracy that in that very pride you may discover grounds for doubting it. There are other persons who are scrupulous, careful, conscientious; who do not want to be more sure than their mind and conviction justify, and will not go for any purpose beyond what they are satisfied they can swear to. My experience tells me that that class of mind is more to be depended upon than the mind of a man with a

cocksure mind. You may depend upon it that, if he is sound and sensible and is of good memory, so far as he goes he is a person whom ought probably to be trusted. It is perfectly true that Hall did not pick out the prisoner in the sense that he came in, and put his hand upon the man and swore to him. But he looked them up and down, and then he asked the policeman what he was expected to do. Now, he knew that he was there called in to do what was the most responsible thing a man could do, to recognize a murderer. In his hesitation, in his queries to the police officer, you may either see if you think fit, on the one hand, signs of a real doubt existing in his mind, or you may see signs of a hesitation, a momentary hesitation, to do that which must be so vital to the person whom he assumed to recognize. It is open to both views, the one view has been put forward by the prosecution, the other view by the defense. It is in the demeanor of the witness, his appearance, his character, the view you take of him, that will guide you as to whether to place him in one category or in the other. True it is that he asked the policeman what he was expected to do, and then the policeman very properly said: "You are expected, if you can, to point the man out whom you saw," upon which Hall said this: "I said I was not sure enough to bind myself by pointing out anybody. I wanted to know whether by pointing the man out I was swearing that he was the man who was with the deceased." But he did select the prisoner. That is the position of Hall. He has come into the witness box here, and he has said that he did point out the prisoner as being very like the man, and that as far as I gather is as far as he is willing to go. Now can you trust him to that extent? Is he mistaken or not? It is for you to say upon that evidence whether or not it comes to this, that the man believes the prisoner to be the man, but that he has not sufficient confidence in the accuracy of his observation to swear to him positively in so momentous a matter. He said that he was like him and so far as he was concerned, if he was told that the murderer was among those nine men, he would not therefore be so trammelled, and that he would have no hesitation in pointing the man out. I have tried I hope with success, to give what I think is the fair judicial interpretation of his evidence. You may see fit, it is your province, to take a totally different view. You may think it is entirely satisfactory; you may think it is entirely unsatisfactory. It is entirely for you to say what view you take of that evidence. The train proceeds and it gets as far as Heaton, and there the deceased's wife comes to meet the deceased. Apparently, he is in the habit of traveling towards the rear end of the train. She meets him every fortnight when he goes. It is her custom. She awaits him on the platform at the customary part of the train. On this occasion the deceased is not traveling in the customary part of the train, and owing to that she nearly missed catching sight of him at all. Just before the train is about to start she sees him. I think he puts his head out of the window. She runs up to him; she has a few moments' conversation with him and she observes this, that there is one man in the compartment with him. I will deal with that piece of evidence in another conjunction a little later on. She observed at Heaton only one other man.

There is a shadow cast by something going over the line, a bridge of some character, which cast a shadow on the man's face. She can only see his profile, and he is sitting in the corner at the further end with his coat collar high up upon the neck and therefore intentionally I should think, concealing as much of his face as he could without attracting undue suspicion; because no one can doubt, whoever that man was, that he was in the train when the deceased was murdered. He was sitting on the seat facing the engine at the far end. He never moved. I think she says he was reading a paper. There came an inquiry. The deceased's wife appeared as witness. As I gather, she said in the casual glance she made she could not recognize him. She turned to leave the court. As she turned, she caught sight of the prisoner's profile. The result of that was that she instantly swooned away, because it struck her absolutely as being the profile of the man whom she saw in the carriage. Yesterday, she came into the witness box, and she went a great deal further than she has ever gone before. She says that, looking at him again, she is certain that he is the man who sat there alone with the deceased in that carriage. The question for you is not whether she is certain; but whether she is right. It is to be said, and fairly said, that an identification thus growing is not to be trusted; that the woman is in a state of distress of mind in which the desire, the natural desire, that the person who has murdered her husband should be brought to account would lead her mind insensibly and gently from possibility to probability, and from probability to certainty. That is how it might be put on the one side. On the other side, it might be said that the more she saw the more she was sure, and in her positive assertion today, knowing what depends upon it, she can only be credited with an honest conviction, freed from all exterior motive, that she is speaking the truth when she says the man in the dock is the man that I saw in the carriage. So much for the deceased's wife.

The train goes on to Stannington. Here the prisoner should have got out. He had booked according to his own statement, and according to the evidence of Athey the man who took the tickets at Morpeth, on to Stannington, with a return ticket, because as his account is his desire was to see Mr. Hogg who lived at Dovecot, and the next nearest station to Dovecot was the station at Stannington. He did not get out. He says he was so occupied in the betting news of the newspaper which he was reading which was more than ordinarily interesting because I think the Liverpool Handicap or some important race was to be run or had been run.

Mr. Mitchell Innes: The Grand National.

Mr. Justice Coleridge: The Grand National had just been run, and he was reading an account of it in the paper.

Mr. Mitchell Innes: I think it is of importance. The Grand National was to be run and it was the calculation of the odds that was important.

Mr. Justice Coleridge: Thank you. At any rate, there was something in the paper which was more than usually attractive and absorbing, and that, owing to that, through inadvertence, he did not get out at the place to which he had booked. There was a man who did get out at Stannington. That was Spink. Spink was in the next compartment and Spink got out.

He got out and as the train passed, for if I remember rightly, you have to wait till the train passes away before you can get out of the station, he saw the deceased sitting in the far corner facing the engine. He was alive and well at Stannington. There was another man in the compartment, clearly the same man whom Mrs. Nisbet had observed at Heaton. He had a moustache and a black felt hat, that comes to nothing, and he was sitting opposite reading a paper. Therefore, it is clear, is it not, that at Stannington the deceased was alive and well with one companion in the carriage. The train reached Morpeth, and at Morpeth a man called Grant got out. He was in the next compartment, towards the rear of the compartment in which the deceased was murdered, for he occupied the first compartment of the second coach.

Mr. Lowenthal: Grant got in there.

Mr. Justice Coleridge: You are quite right. He got in and returned the same day, but whether he got out or got in really does not affect what I was saying. When he got into this compartment of the second carriage he had an opportunity of looking at the compartment in which the deceased was murdered. His observation told him that that compartment was empty. If we believe his story, it is quite clear that between Stannington and Morpeth, the deceased had been murdered, and that at Morpeth the murderer had got out, unless a suggestion be accepted, which has been put forward by the defense, that the murderer had left from the train between Stannington and Morpeth. At Morpeth, the prisoner got out. He had gone past Stannington, and he had therefore to pay excess fare at Morpeth. Here we take up the evidence of Athey, the man who took his ticket. Athey was called, and, at the suggestion of one of you, if I may say so, most rightly and most wisely, recalled. Athey does not pretend that he can identify the prisoner although the prisoner undoubtedly passed him. But it does not matter whether he identifies him or not because the prisoner's story is that he did pass him and did give him his ticket, but the important point of the evidence of Athey is this. He says that the man who passed him had on an overcoat. The prisoner has sworn that he carried his overcoat in his hand, and that it was not a light overcoat but a dark brown coat. Athey describes somewhat dramatically, in a way that I should think, if he is an accurate man, would commend itself to you, how the prisoner, because we can call him the prisoner, as it is admitted that he was the prisoner, though Athey does not recognize him, behaved. He said he had his ticket and his fare in his left hand, and he remembers some little edge of his coat hanging forward so to speak rather to prevent his hand getting out, he made some remark of that kind shewing his attention was attracted to the fact that the prisoner had a coat on. He certainly had, it is suggested, his fare ready; and it is suggested on the part of the prosecution that the exact amount of his excess fare was suspiciously ready. However that commends itself to you, it is a matter for you and not for me; but if the suggestion of the prosecution be correct that in his right hand under his coat, he was carrying a bag with £370 in it, it would not leave his right hand free for getting at his ticket or finding his change. His left hand alone would be free; and, therefore, the prosecu-

tion rather suggest that he, calculating the fare beforehand, got his ticket ready, and the exact amount of the excess fare, so as to be able to pass the barrier, utilizing his left hand and his left hand only. That is their suggestion. Of course, it is only a little fact, not a fact from which you should draw unmerited conclusions, but it is a fact which has been pointed out to you by the prosecution. There being no one in this compartment where the man was murdered apparently at Morpeth. Cosker says there was not one apparently at Longhirst, and at Widdrington, Yeoman, who knew the deceased well, and who had to look through the whole train, when looking over the front, did not see the deceased. Finally, at Alnmouth the body is found under the seat.

I have pointed out that it is suggested by the prosecution that the murderer must have got out at Morpeth. Well, he certainly did not get out at Longhirst, because at Longhirst, only Grant got out, another man whom Yeoman, the station master knows, and a woman; and they all three returned to Morpeth the same day and traveled from Morpeth to Longhirst and back. No suggestion has been made as to one of those three that it was the murderer. He certainly did not get out at Pegswood. Only two persons got out at Pegswood, and both were women as the station master tells you. The only suggestion, I suppose is that he might have got out at the stations intermediate between Pegswood and Widdrington. There are two or three stations.

Mr. Mitchell Innes: Pegswood is the next station to Morpeth.

Mr. Justice Coleridge: Then Longhirst and then Alnmouth. It is the only suggestion that can be made, but I have not heard that it was seriously argued. In the meantime, what was the prisoner doing? His object he tells us was to go to see Mr. Hogg at Dovecot. For Dovecot, as I have told you, the station was Stannington, and Stannington was the station to which he booked. He said it was in connection with a new sinking operation at Dovecot. Hogg has been called. Hogg says that it is true that on two or three, it may be three or four occasions, previously the prisoner has visited him at Dovecot, coming out of Newcastle for the purpose. What the purpose or object of those visits was, Hogg does not much enlighten us upon. He does not know, he knew him as a friend. He cannot tell you what the exact reason, in fact he can assign no reason, was for those visits. He says he came and chatted to him; but that he had no connection whatever with the sinking operations, and he certainly does not confirm the prisoner's suggestion that there was any connection between the prisoner and Hogg, in the matter of the operations of sinking at Dovecot. He did not come as a rule by appointment. He certainly did not make any appointment on the 18th March, because Hogg was in Newcastle on that day, and so was not there if he had visited the colliery. It is pointed out to you, and it is suggested it is a significant fact, and it may strike you in that light or it may not, that the last visit that the prisoner made to Hogg was on the Friday a fortnight before. That is the very day upon which it was customary for the deceased to travel by that train, and travel with the money for the wages. I suppose the suggestion would be that the prisoner was either taking what might be called a trial trip for the purpose of

laying his plans, and seeing what time it took to do this, that, and the other, or it may be, as I suppose the prosecution would suggest, that he could not get the deceased to travel alone, and that therefore he was tracking him and tracking him without result. Those are mere surmises to which you may attach no weight, but they are incidents which it is perfectly right that the prosecution should draw to your attention.

What is the net result, to sum it up, of the evidence so far? The net result seems to me, but it is a matter for you, to be this. Firstly, that the deceased was in the third compartment of the first coach; secondly, that he was murdered between Stannington and Morpeth; thirdly, that there was one man and one man alone in the carriage with him, certainly between Heaton and Morpeth; fourthly, that the prisoner, if you believe Raven, was seen with the deceased at the station at Newcastle in apparent companionship with him; fifthly, that the prisoner was seen with a companion getting into a compartment approximate at any rate to the one in which the deceased was murdered, that is, if you believe Hepple; but that it was not the first compartment of the coach because Bruce was there and not the prisoner, not the second compartment of that coach, because Spink and Hall were in that, and not the prisoner. Then, if you believe Hall, and I do not repeat what I said about his identification, because you have it in mind, Hall points out (I will not say identifies) the prisoner as being the man who got into the third compartment at Newcastle with the deceased. That is the summary, I think, I hope the fair summary, I believe the accurate summary, of the evidence. Further, at Heaton, Mrs. Nisbet saw the man and you will recollect what I have said about her identification. The result of that surely is this, if we believe it, unless we are to throw it to the winds, that the prisoner had a companion. He says he had none. If he says he had no companion, when we know that he had, who was that companion? Have the prosecution satisfied you that that companion was the deceased, or have they not? If they have, the rest of the case is not worth investigation. If you await further evidence, then all the rest of the case becomes material.

I now pass on to the rest of the case. The prisoner has given us an account of his movements. Though it may be perfectly true to say that an innocent man may from stupidity, or some desire to shield or conceal something that he wishes to conceal, give a false account of his movements, yet, in the proportion of the gravity of the case against him lies the improbability that he would tell a false story merely to conceal something. Nothing is more momentous to him if he be innocent, than to tell the truth. Therefore, a good deal depends upon whether you believe or do not believe the story of the prisoner's movements as recounted by himself. If you believe them, it is in his favor. It is a complete exculpation of the accusation that is brought against him. If you do not believe them, what assignable cause has he given for deceiving us? With those preliminary observations let me now draw your attention to the prisoner's own story of his own movements. Up to the time of his getting out at Morpeth, no controversy arises. At Morpeth he found on the opposite platform, a train of the existence of which he knew waiting to take passengers

to Stannington. His desire being to see his friend Hogg at Stannington, and his desire at the outset to travel as far as Stannington, and Stannington only, there was the opportunity at once to cross the platform, take his seat for Stannington, and be back at Stannington within ten minutes. He knew the train. He knew of its existence. He knew it had not left. But he does not. He goes out at Morpeth under the circumstances which I have recounted to you. He says this is the reason for his action, "As I intended if I had gone to Stannington, to Dovecot, to have walked in to Morpeth in order to pass by an adit or some sinking operation about half way between Stannington and Morpeth, it did not matter to me which way I walked, whether from Stannington to Morpeth, or Morpeth to Stannington, and I determined to walk from Morpeth to Stannington instead of from Stannington to Morpeth." That is the account that he gives of not going back to Stannington by the next train. He comes out of the station at 11:10, I think it is, and from 11:10 until 20 minutes after one no one sees him. That is common ground. Where did he go? He says he set forth on the walk to Stannington, and then he is attacked by some strange malady. I could not discover quite whether it was diarrhoea or whether it was constipation. He would seem to infer that it was a mingling of both, which seems to me to be a mixture of opposites. In going along the road, he had walked for some distance when this malady attacked him. He got into a field. He cannot remember whether there was or was not a hedge between the road and the field, whether it was a high quickset hedge, whether he got over the railings, or through or under or past the quickset hedge, if any. It is strange obliviousness. It may be, as he says, that his pain was so extreme as to take from him the power of observation. He met no one. He lay down, I think, two or three times in this field, getting up at intervals and lying down again. He did not get as far as the sinking operation, the adit, which was half way; therefore, he did not get more than about a mile and three-quarters or so from Morpeth. Then he returned to Morpeth without having seen the sinking operations half way or his friend Hogg at Stannington. He returned, so he says, to Morpeth, and he returned too late to catch the 1:10 back to Newcastle, and he had to wait until the 1:40. Recumbency being accorded to him, the remedy for the malady of piles from which he was suffering, he certainly did not seek the ordinary remedy. I presume that at the station of Morpeth, there is a waiting room, if not a bench, or a chair; but he goes out from Morpeth and walks up to the town towards the Newcastle Arms. There, some time about twenty minutes past one, he meets a man called Elliott, and a police officer of the name of Sanderson. There he passed the time of day.

Mr. Mitchell Innes: He was not a police officer.

Mr. Justice Coleridge: Very well, a man named Sanderson. It is said, why did not they call Sanderson and have thus ascertained that his statement in regard to Elliott was quite correct? They have ascertained, I do not doubt, that the prisoner is correct when he says that he met Elliott and he met Sanderson and talked to them; and he may be perfectly correct in saying that so far as Sanderson and Elliott were concerned, he did not

exhibit anything in the manner which aroused suspicion. Apparently he did not, or else I suppose he would have dilated upon that, acquainted them with his malady, or exhibit signs in his face of the sufferings he had undergone, because according to him, he has put it forward in his own defense, then he appeared cool and collected in his manner. The prosecution say what happened after 1:20 is quite immaterial. What happened to you between 11:10 and 1:20 is the vital question in the case? Gentlemen, you have heard this story of this malady; you have heard his account of his walk, do you believe it? If you believe it, then clearly, you must seek elsewhere for the murderer. If you do not believe it; what assignable ground has been put forward for this statement of facts which are no facts? Assignable grounds consistent with his innocence, I mean, because naturally a guilty man would seek in any way that he could lay his hand to to account, otherwise than how they were spent, for the spending of that crucial interval. Gentlemen, you have heard him, and I have no doubt that you have formed an opinion as to whether or not you can rely upon his story in regard to the passing of the interval. The story depends upon his evidence, and his evidence alone, for he did not use the lavatory at Morpeth going or returning. He did not acquaint anybody at the railway station with his malady; neither Elliott nor Sanderson whom he subsequently met. I know not how much this road may be, it may be a very little frequented, but in fact, he met no one on the road, and therefore has no corroborative evidence of his being on that road at all.

Mr. Mitchell Innes: As you have been good enough to invite correction, may I remind your Lordship that it is the uncontradicted evidence on behalf of the prisoner that he has in fact been treated for this very malady at the prison?

Mr. Justice Coleridge: I do not doubt that. I am glad to be reminded of it, and I do not think anybody has disputed he suffered from piles. Of that I have no doubt. He said he was so treated in the prison, and I do not gather there is any contradiction, or that any question was put about it, that he had suffered from piles.

Now, gentlemen, I pass by that. I will say a few words about the important question which has been raised by the defense in regard to this, the defense, if I may say so, so discreetly, so fairly, so eloquently urged, and with such restraint. He made a statement to the police, and it is urged on his behalf and I have no doubt you gave it due attention, that much of the story which we now know came from the lips of the prisoner at the time when he himself alone knew of it, and when the police were ignorant of it, and after it would have been difficult for the prosecution to patch the story up in the absence of the guidance given by the prisoner in his own voluntary statement. It is urged that behavior like that speaks trumpet-tongued in favor of his innocence, that no guilty man would so inculcate himself and only an innocent man would make statements which would be available and useful to the prosecution in his own prosecution. What are we to say to that? A great deal depends upon what the prisoner thought the police knew. He did not know how much they knew. I am

not saying this against him. I am only putting the argument hypothetically, you understand; and I am assuming for the moment without proof, that he was a guilty man. He would know that to say he had not traveled by that train might be proved beyond demonstration to be false. He was known. He had traveled by that train before, it would be very strange if someone had not observed that. Does it commend itself to your good sense that a guilty man would have said as much truth as was possible without implicating himself in the crime? It was an innocent act to go by the train. It was an innocent act to travel by the train. He was known, and it might be traced where he got out; it might be traced where he had got his ticket. It was a perfectly innocent act to pass from the station, a perfectly innocent act to get out and pay the excess fare. All those facts are perfectly consistent with innocence. Would a guilty man, who was a clever man, find it the best resource to tell all those facts which did not implicate him so as to prevent its being said that you told us anything that was false. It is true you traveled by the train. It is true we find that you got out at Morpeth. It is true that you took a ticket to Stannington. I do not want to suggest anything against the prisoner, but when you have an argument put before you that in the fact that he made these statements lies the strongest testimony to his innocence, I think it must be said that you may look at it if you think it right, under another aspect. It may be consistent with his innocence. It may be consistent with his guilt.

In regard to the murdered man, it is proved to demonstration that he was murdered with bullet shots, with four, I think, actually embedded in his head, either there is evidence of their having wounded him in the head, or they are embedded in his head. Certainly one if not more, of the wounds must have been instantaneously fatal. The presumption is that one of them, at any rate, must have been inflicted when the man was crouching on the ground, holding up the collar of his coat to ward off an anticipated attack, because the bullet went through the back of the collar of his coat, and the bullet went into his brain. The place where it entered his brain was high up upon his neck, shewing that the coat had been drawn up to ward off an attack. The direction of the wound was up, which looks as if the man was prone when the wound was inflicted. Another thing that is clear is this, that the wounds were inflicted by two instruments, that is, by two pistols, because they were inflicted by a small nickel-plated bullet, which was a leaden bullet, and the two classes of bullets would not fit into the same bore. The first natural inference you would derive from that is, would you not, that the man must have been attacked by two persons, each holding a lethal weapon? As a matter of fact, it would appear upon the evidence, unless we are to disregard it in its entirety, one man and one man alone was the companion of the deceased in that compartment. If, therefore, you are of opinion upon the evidence, and I will not recall it to your minds, that one man and one man alone was in the carriage with that deceased man when he was murdered, it stands to reason, does not it, that, however unusual, the murderer must have used two weapons, unless one of the wounds was self-

inflicted by the deceased, which is a suggestion that has never yet been put forward. But whoever committed this murder clearly was a man who had thought it out beforehand, who had laid his plans, and it may be, though I know not, that the murderer, whoever he was, thought it would be safer, inasmuch as he traveled alone with the man, and was only seen alone with the man, to give some good ground for believing that inasmuch as the murder was committed by two, in some way or somehow he was not one of the two and in some way unexplained the man met his death unconnected with the murderer himself. One knows not what may operate exactly in the mind of a man, whoever he be, because whoever he be in this case it was the mind of a man who had planned it, and had carried into effect a concerted skilful plan, weighing the effect upon the public mind of this, that, and the other piece of evidence. Therefore, if we believe that the deceased had one companion, and one companion only, the argument that two pistols point to two operators fails to have any effective force.

Gentlemen, I pass by the question of the wounds because that really has not been seriously contested.

You have one or two other pieces of evidence which are said to implicate the prisoner. On the 30th March, 1910, a fawn Burberry overcoat, which has been produced, was taken from the prisoner when he was in custody. On the left front, and you have seen it at the bottom, there was a very large stain. The doctor cannot pronounce what caused that stain. It was a stain that had been treated. It had been rubbed with something apparently in the nature of paraffin. That was shewn by the slight infinitesimal globules of the oil still remaining on the fabric of the garment. The edges of the stain, exhibiting a lighter texture from the rest of the coat, bore witness to the efficacy, or want of efficacy, in rubbing with some cleansing substance the injured place. Paraffin, while it does not necessarily erase marks of blood, prevents the chemical test for blood discovering its presence. Therefore, so far as that stain is concerned, there is no evidence that it ever consisted of blood. It seems to be an old coat, a well used coat. We know very well that coats of that kind get stains upon them, and that when they get stains on them, people try to rub them out, and in the absence of any evidence indicative that that stain was a blood stain, I would suggest to you that you dismiss it from your minds. It may be capable of a totally innocent explanation. He says that very likely some bicycle oil got on it. At any rate, it would be most unfair, and to the prejudice of the prisoner, to press the evidence in regard to that coat further than legitimately it should be pressed. I would caution you, if I may advise you, not to regard the coat as any evidence implicating the prisoner.

Then there are two other pieces of evidence of a like class. On the 21st March, 1910, a pair of gray suede gloves were taken or found, at any rate were taken as belonging and did belong to the prisoner. On the palm surface of the glove, on the thumb of the left hand, appears a smear which chemical analysis pronounces to be blood. It can pronounce no more, it cannot pronounce whether it be human blood, mammal blood, or

blood of fishes; but it is blood. It is not due to any cut upon the finger penetrating into the fabric of the glove because the mark is from the outside and not from the inside. The glove has come in contact with blood. The prisoner says that on the occasion in question, he was wearing tanned gloves, gloves which undoubtedly present no suspicious appearance at all. If I rested there, you might say why should you not believe him? But he further supplements that statement by saying that these suede gloves had been cast aside and not worn for, I think he said, three months; that he wore his tan gloves in their place. The doctor says that the blood which was found upon the glove was recent. It could not have got upon that glove three months before; it must have got upon that glove within a very short time of the 21st March, when the gloves were taken and examined. Asked how he could account for the glove, the prisoner says, "I cannot." It is urged that in this carriage the body when discovered was reeking with blood. Blood had poured from the head across the floor. It had poured from the elbow joint down behind the seat, and I think the expression the learned counsel used was that the carriage was a shambles. Gentlemen, it all depends to my mind upon how soon the deceased met his death. If there was a long struggle during which blood flowed freely, then I think it would be a fair thing to say that in a struggle with a desperate man who was bleeding from cut arteries, you would expect the murderer to exhibit signs, upon his person of considerable effusion of blood; but not if the first shot, or the second shot, if not instantaneously fatal, stunned the victim, and made him motionless and incapable of resistance, then the man would only have the corpse to deal with. He might dispose of that as carefully as a murderer would who was desirous of letting as little tell tale blood as possible appear upon his clothes. It all depends upon that. If there was evidence of a fearful struggle, if the walls of the carriage were splashed in all directions, if the glass was broken, and the cushions of the seats hurled about, if they were loose, then I think the argument would be strong; but, in the absence of such circumstances, it is for you to say, whether the argument is equally strong.

Then, again, there is the question of the trousers. The trousers which had been the subject of the investigation were the trousers which, by the admission of the prisoner, he was wearing on the 18th March. Inside the lefthand pocket appears stains of blood. I do not suppose people who have listened to the evidence will doubt that those stains of blood were produced by the glove, still having wet blood upon it, being put into the trousers with the hand inside. There again the prisoner is asked to account for it, and though there may be a hundred ways of explaining blood dripping on the outside of your clothing, the suggestion of the prisoner that his nose bled, may or may not commend itself to you as a satisfactory explanation of blood upon the inside of the pocket of his trousers. I cannot assist you further than to tell you that there is no explanation with the exception of that explanation which he does not say is the explanation which he puts forward knowing that it was so, he does not say on such and such a day my nose did bleed, and I remember my putting my hand into my pocket, or anything of the kind, and it fell

down from my glove, and I had my glove on. The explanation which is put forward, at any rate, is vague, and other explanation he apparently has none. It is for you to say whether that explanation satisfies you as an account of the existence of those marks of blood. If it does, you are entitled to put that out of the case. If it does not, what does it tell? I leave you, gentlemen, to supply the answer.

Now, gentlemen, I believe that I have gone through, I do not say every fact, but if I have omitted any fact material or immaterial, supply it for yourselves and supply the argument which you base upon that fact. I do not pretend to have exhausted every item in this case.

The suggestion on the part of the prosecution is that between 11:10 and 1:20 somebody, the murderer, took that bag, ripped it open, and threw it down the Isabella pit. That is not disputed. There was the bag. There was everything gone but the 19/—in copper, bulky stuff that you would not carry away. All the gold and silver were gone; but all the papers relating to the distribution of the money were in the bag, which identified the bag beyond question as the bag which the deceased carried. If the prisoner did not go down the road to Stannington where did he go? If you think he went down the road to Stannington, then you will acquit him; because it is quite inconsistent with the deposition of the bag in the Isabella mine. The prosecution do not suggest he carried the bag about him for days and then put it down. Although the mine it is true, was not searched sufficiently to discover the bag until June. I do not suppose anyone will doubt that the murderer, whoever he was, took the first available moment to get rid of the evidence of his guilt. The prosecution say he carried the bag with him when he got out of Morpeth Station. I think the learned counsel for the prosecution invited you to say, if that was not proved, he was not the murderer. I do not know that that quite follows. I can understand, whoever the murderer was having many ways of disposing of the bag. The bag might have been thrown intact from a selected spot in the railway, and afterwards searched for, recovered, and dealt with. It may be that the murderer, whoever he was, who certainly got out at Morpeth, may have thought that to come out at Morpeth without a bag would certainly tend less to his discovery, than coming out at Morpeth with a bag containing £370 upon him. All that is left in the vague. We know not how and when that bag was placed and how and when it was ripped open. The prosecution say there was an interval between 11:10 and 1:20 unexplained by the prisoner during which an opportunity could be afforded for the disposal of the bag. But there it is left. As I say, if you believe the prisoner's story of his movements on that afternoon, it is clear that he did not deposit the bag in the Isabella mine. If you do not believe it, you must ask yourselves, where he went, what he did, and why he conceals it from us? It is perfectly true, as the prosecution say in this case, that this is a case of circumstantial evidence and circumstantial evidence alone. Now, circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That net-

work may be a mere gossamer thread, as light and as unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents, through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances all pointing in the same direction, convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence, standing by itself, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be, I do not say that it is, overwhelming proof of guilt. The law does not demand that you should act upon certainties and certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties. We ought to act, we do in fact act, on just and reasonable convictions founded upon just and reasonable grounds. Juries ought to act upon the evidence. The law asks for no more and the law demands no less. Gentlemen, if upon a grave and careful purview of the facts any reasonable doubt assail your minds, the prisoner is entitled to go free. The prosecution are bound to allay such doubts and to convince you of the truth of the accusation which they bring. Ask yourselves then, what is the cumulative effect upon your minds of so many, so varied, so independent pieces of evidence, all pointing, it is said, in one direction, all tending, it is said, to inculcate the prisoner, and the prisoner alone, in the commission of this crime. Summon to your aid just and ordered reason. If it tells you that the guilt of the prisoner is reasonably proved, then the law and the oath which you have taken alike demand that you should act with firmness and with courage.

My duty is done. Yours remains yet to be fulfilled, and I pray most earnestly that you may be guided to the deliverance of a just and righteous verdict.

Mr. Mitchell Innes: My Lord, your Lordship may not have thought it worth while to mention that there was a suggestion which I regard as serious made by myself on behalf of the prisoner, that the murderer may have leapt from the train between the stations.

Mr. Justice Coleridge: I dealt with that.

Mr. Mitchell Innes: I did not understand you did.

Mr. Justice Coleridge: I did mention that.

Mr. Mitchell Innes: I beg your pardon.

Mr. Justice Coleridge: You may take any documents you desire, gentlemen.

The Foreman of the Jury: Thank you.

THE JURY RETIRES.

At 12:55 the jury retired and a half hour's adjournment was announced. From the beginning of the trial the court-room floor and galleries had been crowded with spectators.

The bulk of the people in the galleries declined to leave the places they had selected, and beguiled the time in eating sandwiches and such like, and cups of tea were also served. The floor of the court, too, continued to retain its occupants. Meantime, Lord Coleridge and those accompanying him on the Bench, had retired, and Dickman, too, was not to be seen in the dock. The prisoner was conducted below the moment that the jury had left the box.

During the long interval taken up by the jury in coming to their decision the prisoner was agitated and exclaimed on one occasion, "Oh, dear me!" A remark was passed to him that it must be an anxious time for him, and his response was, "Yes, it's a very anxious time."

At half past three a knock was heard and the whisper went, "The jury are coming." Excitement became intense. The usher called out, "Silence." His lordship resumed his seat on the Bench. Simultaneously Dickman climbed the steps leading to the dock. A warder stood at each side. The jury filed into court and took their seats. The prisoner remained calm and collected, stroked his moustache, and gave a keen look all around the court. He surveyed the jury as they filed into their places, and then averted his head, and stood with his hands resting on the iron railings of the dock, looking steadfastly at the bench.

THE VERDICT.

Mr. Justice Coleridge: Gentlemen, before you give your verdict there is an incident in yesterday's proceedings which I forgot to allude to. Learned counsel for the prosecution commented upon the absence of the wife as a witness for the defense in connection with the allegation made by the prisoner that the wife had cleaned his coat. Such a comment is forbidden by the law to be made, I ought to have said, but it escaped my attention for the moment. I attach no importance to the coat, and I think I indicated this to you; therefore, I forgot to add that such a comment made by the learned counsel ought to be banished from your minds, and not to influence your verdict. If you allowed that comment to affect your minds hostilely to the prisoner, I must ask you to reconsider your verdict, dismissing such comment from your minds. If you have not allowed it to affect your minds in any way, then you can deliver your verdict.

The Foreman: It has not.

Mr. Justice Coleridge: Have you allowed it to affect you?

The Foreman: We have not.

Mr. Justice Coleridge: Then that question does not arise.

The Foreman: It has not been mentioned.

Mr. Justice Coleridge: I understand you have not allowed it to influence your minds.

The Foreman: We have not mentioned it.

The Clerk of Arraignment: You are all agreed on your verdict?

The Foreman: Yes.

The Clerk of Arraignment: Do you find the prisoner at the bar guilty or not guilty of wilful murder?

The Foreman: We find him guilty.

The Clerk of Arraignment: That is the verdict of you all.

The Foreman: Of us all.

THE SENTENCE.

The Clerk of Arraignment: John Alexander Dickman; you have been convicted of wilful murder. What have you to say why the Court should not give you sentence of death according to law.

The Prisoner: I can only repeat that I am entirely innocent of this cruel deed. I have no complicity in this crime, and I have spoken the truth in my evidence, and in everything I have said.

Mr. Justice Coleridge: Prisoner at the bar, this careful trial is now ended. The irrevocable decision has now been given. The jury have found you guilty of the crime of murder. In your hungry lust for gold you had no pity upon the victim whom you slew and it is only just that the Nemesis of the law should overtake the author of the crime. The scales of justice are now balanced by the verdict which your fellows have pronounced; the punishment is death. I do not presume to judge you. I am nothing but the minister of the law and in passing sentence I only do that duty which the law commands. That sentence is that you be taken from hence to the place from whence you came, and from thence to a place of execution, and that you be there hanged by the neck until you be dead, and that your body be afterwards buried within the precincts of the prison in which you have been last confined, after your conviction, and may God Almighty have mercy upon your soul.

The Chaplain: Amen.

The Prisoner: I declare to all men that I am innocent.

Mr. Justice Coleridge discharged the jury and thanked them for their services. He announced that they would be exempt from serving as jurymen during the next five years.

[TO BE CONTINUED.]

THE LEGAL EVOLUTION OF PEACE.

The progress made in the last twelve years by international law and its corollary, the movement for peace, has been nothing short of remarkable. And yet, viewed in the light of the history of human institutions, it is a natural concomitant of advancing civilization. The development of international law and relations toward a condition of relative peace finds close analogy in the development of private law. Private war and vengeance, which once enjoyed legal sanction, are now considered criminal; there is a general desire to bring public war under the same opprobrium. When the thinkers of the present day, who even *now* regard war as unmoral, shall have convinced the large majority of the people of the civilized world that it is unmoral, and that the economic and industrial welfare of mankind depends upon providing international peace with a legal sanction, war will have taken its place among the illegal agencies for settling international differences.

The peace we now enjoy in our private relations is directly attributable to the gradual perfection of our legal institutions. The relative peace under which we live in our international relations has been largely brought about by the development of international law. The road by which private peace was secured was a long and thorny one; and there are many indications that we still have a long road, precarious and full of pitfalls, to travel before we shall have registered our arrival at the final goal of international peace.

Misunderstanding of the facts as they exist, a misconception of the nature, hereditary instincts and history of the international society whose ills we desire to cure is the greatest danger confronting the peace movement. Henry IV, with his Great Design for a European Confederation and James Mill, who a century ago advo-

cated an international tribunal, with general disarmament as a preliminary, and others after them, made the great mistakes of not taking into account the existing facts, and of seeking to regenerate society at one bold stroke. As Sir Henry Maine says, war is too ancient an evil to submit to any single panacea.

At the present time, however, we have reached a point where remedies can be suggested and applied with an assurance of their reasonable consideration by states; and with the growth of an international public opinion in their favor, an assurance of their ultimate acceptance. Various remedies for settling international differences have been suggested, of which the most effective in practice has been a court of arbitration, or court of justice.

Private individuals did not always display their present willingness to submit their disputes to the arbitrament of courts. The struggle was a long one and fiercely waged, extending from the beginning of history until modern times. But old as are the beginnings of society—tribal relations,—international society in such form as we can recognize it did not begin until two or three thousand years later. It is therefore natural that it will take a little longer to arrive at the same stage of social development that our private relations have reached, but the analogies between the two are clearly traceable.

The bond of primitive society was kinship. The first stage in the social relations between the units of that society is marked by universal belligerency, a very natural rule. Disputes were accompanied by a limitless resort to private war and private vengeance. Such action was unrestrained by any humanizing agencies, uncontrolled by any superior, and unlimited in its devastating effects.

In the international society, some analogy to this first stage may be discovered in the utter license and unrestrained cruelty with which the wars of the Reformation were waged—the period when the modern society of states had its origin. This very barbarity had much to do with the writing by Grotius of his epoch-making work, in which

the beginnings of a system of international law are presented.

The second stage in private relations discloses a gradual limitation upon the waging of private war, by confining vengeance to certain members of the family or kindred, by restricting it to certain offenses, and by inaugurating a system by which pecuniary compensation for minor offenses could be paid. Sir Henry Maine regards these money fines for private wrongs, such as the *Wèrgeld* of the Germans and the *Eric* fine of the ancient Irish, as evidence of a very early conscious effort to prevent war or mitigate it.¹ Pollock and Maitland suggest that the amount of compensation was probably fixed by some form of arbitration.²

The second stage in international relations is marked by the introduction of humanizing agencies in war, first through the influence of great writers, principally Grotius and Vattel, then through the influence of progressive civilization and the growing wisdom of states. Such agencies are exemplified in the codification of the rules of neutrality and of war, especially the amelioration of its hardships. This was largely the work of the Geneva, Brussels, St. Petersburg, and Hague Conferences.

The third stage in private relations is marked by the growth of the kingly power and the gradual waning of the self-helping autonomy of the kindred. As Maitland remarks, private war is "controlled, regulated and put into legal harness."³ In this period we find the beginnings of a system by which an issue is submitted to the arbitrament of some impartial agency. Private vengeance, however, was not abolished, but merely regulated. The king was not yet strong enough to compel his warring subjects to come before the court; but side by side with regulated private war there grew up a system of trial, by battle, by compur-

¹ Maine, Sir H., "International Law" (New York, 1888), p. 12.

² Pollock & Maitland, "The His-

tory of English Law" (Cambridge, 1895), vol. 1, p. 24.

³ Pollock & Maitland, *Idem*, vol. 1, p. 7.

gation, and later by jury. The institution, however, was weak; there was no jurisdiction save by consent of the parties. As the king grew stronger, a scale of compensation for injuries, a sort of tariff was decreed. Compensation had to be accepted, if offered, and private war was lawful only when the adversary obstinately refused to do right.⁴ Many and serious were the difficulties in the path of the judicial adjustment of private disputes.⁵

International relations in this third stage are exemplified by the co-ordinate existence of a regulated public war and a system of international arbitration—our present condition.

From the conflict between the two agencies for settling differences in our private relations, private war and the courts, the judicial method emerged victorious; and the fourth stage finds us practically under the full dominion of a judicial method of settling our private disputes.

Among the systems of trial, however, trial by jury had to carry on a fierce struggle for supremacy with trial by battle. The prevalence of perjury and other disadvantages influenced a preference for trial by battle, even long after trial by jury had been established. It is a mistake, too, to assume that trial by battle did not satisfy the sense of justice of the litigants. It did. They believed that an impartial spirit was acting as judge, who in letting fall the mantle of victory, indicated the right. But superstition has given way to reason. We now realize that a belligerent method of settling disputes does not *do* justice; that is why arbitration is replacing war as the only equitable agency for adjusting an international difference.

The analogies we have traced, in particular the evolution from the third into the fourth stage in private law, give us every reason to believe that the conflict between the two agencies on the international side, public war and arbitration, will result in a victory for the judicial system, and that a submission to the arbitrament of judicial agen-

⁴ Pollock & Maitland, *Idem*, vol. 1, p. 25.

⁵ Pollock & Maitland, *Idem*, vol. 1, p. 27.

cies will take its place among our permanent social institutions.

II.

Peace in the international community is a social need. States were never so willing as now to listen to practical suggestions for its realization. History explains the reason. With the break-up of the Holy Roman Empire and the destruction of the idea of universal sovereignty, of a common superior, spiritual and temporal, a chaos resulted, exemplified in the horrible wars of the Reformation. From that time until the Congress of Vienna, in 1815, the states of Europe were engaged in a tremendous struggle of territorial adjustment. The influence of Grotius, which first bore distinct fruit at the Peace of Westphalia, brought certain rules into this process of adjustment, but the idea of international peace engaged thinkers and not statesmen.

The nineteenth century, however, was marked by a movement for national unification throughout the world, and while the force of arms played a small part in this nationalization, commerce and industry were the great factors in the process. The greatest changes in the legal position of aliens occurred in this century. From his original status as an enemy *eo nomine*, the alien has gradually become practically assimilated to the national in his legal rights. The facilities for naturalization and immigration, and rapid communication, have brought about the democratization of the world, cosmopolitanism. With the growth of social and commercial intercourse among nations, the discoveries of science, and the extreme mobility of capital, states have come to recognize the unity of their interests. An international consciousness has been awakened. The result has been a growing solidarity in international organization. This present century is to be one of international development or, as Prof. Lorimer puts it, "from independence has emerged interdependence."⁶

⁶ Lorimer, "Institutes of the Law of Nations" (Edinburg, 1883), vol. 1, pp. 139, 236, 445.

International law has kept pace with the necessities of the new order, as is shown by the number of international conferences of the last thirty years. The many international unions and agreements on industrial, economic, scientific and legal matters indicate that nations have become convinced of the necessity for co-operation and international arrangements of an administrative nature. In addition, almost two hundred international conferences of an unofficial character within the last seventy years, covering almost every field of human thought and activity, are evidence of the solidarity of world interests.

It is therefore apparent why war is now a greater catastrophe than ever before. While we have been endeavoring to localize war by enlarging the obligations of neutrals—and much still remains to be done along this line⁷—it is nevertheless true that a public war between any of the units of the international community shakes the security of the entire structure and impairs the welfare of all. It is therefore not difficult to realize why all states are now willing to co-operate to prevent an international war and adopt the necessary means to this end.

No society can exist without some rules for the conduct and mutual intercourse of its members—*ubi societas ibi jus*. Just as the judicial order of national life springs from, at the same time that it ministers to, its development, so has international arbitration proved itself to be a factor in the development of the society of nations, which has made it possible and of which it is the outcome. Yet, up to the present time, statesmen and lawyers believe that arbitration has its limitations. As we have said, there exists in the international society a body of rules or a *modus vivendi* for the conduct of its members. Westlake points out⁸ that a claim by one state against another for a breach of this *modus vivendi* resembles very much a claim of one individual against another before national

⁷ See the resolutions of the Third National Peace Congress at Baltimore, May 5, 1911.

⁸ Westlake, "International Law" (Cambridge, 1904), vol. 1, p. 1.

courts of justice, for both deal with legal relations. These claims are eminently fitted for arbitration. The action of states, however, is not confined within these legal limits. They must sometimes act under circumstance where there are no rules. A situation of this kind in private life is met by the national legislature enacting new legislation. In the absence of an international legislature or immediate agreement on a rule, states must act for themselves, and it is in these spheres that we find what is called the political action of states, or international policy.

The Russian delegates to the First Hague Conference pointed out that the former class, legal claims, being a conflict of rights, may appropriately be made the subject of an arbitration; but that the latter, being a conflict of interests, do not admit of this method of adjustment. The Russian delegates included under such political questions what they called political treaties, transitory arrangements between states which bind the freedom of action of the parties so long as the political conditions which produced them remain without change. Such a question is illustrated in Russia's own history.⁹ At the end of the Crimean war, Russia, exhausted, was compelled to submit to a treaty in which she engaged to neutralize the Black Sea, and to maintain no fortifications on the coast. In 1871, taking advantage of the disablement of France, she denounced the treaty and proceeded to erect a fortification at Sebastopol. No single power was strong enough to prevent her. As a result a conference was held, a tribute paid to the binding (sic!) character of treaties, and the limitations on Russia removed by consent. Could such a question have been arbitrated? A court could have reached but one conclusion. No state can, by an unilateral act, legally put an end to a stipulation it has signed. Russia, therefore, would never have consented to arbitrate this case. Characterizing it as a political question, Secretary Hay, in 1904, considered the Panama question with Colombia unarbitrable. Would

⁹ Westlake, *Idem*, vol. 1, p. 341.

we arbitrate our right to fortify the Panama Canal, if the right were brought in question?

Such matters as these are embodied in the general reservation of "independence" in treaties of arbitration. Questions of honor can be arbitrated. This is shown by the duel in the German army, where the question of violated honor must first be passed upon by a court of officers before the duel is allowed to be fought. When an enlightened public opinion will induce states to add to the functions of an arbitrator those of a mediator, even such political questions will probably be arbitrated. But first senseless nationalistic pride must be abandoned, fair dealing and good faith assured by international guaranty, and confidence in arbitrators and mediators strengthened.

Even now where independence or freedom of action is not likely to be affected by an unfavorable decision some states have considered it perfectly safe to conclude arbitration treaties without reservation; as, for example, Sweden and Norway, Italy and Holland, Chile and Argentine and other states. The United States and Great Britain and the United States and France are about to undertake a step along this line, which by its example will give an unprecedented stimulus to the cause. It appears already to have moved Germany and Japan to action.

In the time of the great Empires, the Egyptian, the Assyrian, the Median and the Roman, peace was fairly well maintained by the power of arms of a strong central superior. The Emperor compelled his constituent tribes to refrain from hostilities, and there was comparative peace.

We in the present day are dealing with a different order of international society. We desire to erect another power, an intellectual power, to induce and exercise coercive influence among states to bring about international peace. This intelligence has already created methods to avert war by means other than the fearful expenditures now undertaken in preparation for peace, as some would have it.

First, reason and intelligence have aided in establishing

good faith between nations. This alone has placed diplomacy on a higher and more effective plane than ever before in adjusting international differences.

Secondly, the Congress of Paris of 1856 and the Hague Conferences have succeeded in giving mediation a more potent influence in adjusting controversies than it every enjoyed before. Formerly regarded as officious intermeddling, it has now secured legal sanction and can no longer be considered an unfriendly act. Where the opportunities for the arbitration of legal differences are now considered as exhausted, mediation has unlimited possibilities in adjusting all kinds of international disputes. In South America on several occasions it has proved its great value.

Disputed questions of fact are recognized as a most dangerous and virulent cause of war. The Hague Conference, in the third place, created the machinery for settling such questions by Commissions of Inquiry. The use of this instrumentality has already prevented one war (between Russia and Great Britain), and will probably show its usefulness in many other cases. Had our people exhibited more self-restraint in 1898, it is not unlikely that such a Commission of Inquiry might have prevented the Spanish-American War.

The fourth great agency to prevent war is international arbitration, to which we have already referred. Arbitration in some form is as old as history, and toward its immediate development and improvement every effort should be bent. As the architects of this powerful social institution, the Hague Conferences will have left their immortal justification, both in enlarging the scope of the questions which may be submitted and in improving the machinery. For its successful operation, confidence in arbitrators is, of course, a condition precedent.

But the very fundamental condition on which arbitral justice rests, the most effective means of fostering international peace is *education*, the education of public sentiment. The resort to arbitration must find its sanction in

a compelling public opinion, before it can become positive law. The time is ripe for it. The democratization of the world has taken war out of the hands of kings for the satisfaction of personal and dynastic ambitions, and passed it into the control of peoples. Ignorance, contemptuous conduct, ill temper, resentment, or fury are now the principal causes of war. Psychotherapeutics constitute the most essential element in the remedy. The education of the people of the world, the people that now pay for battle-ships, must enlist the co-operation of an enlightened press, which will forego the sensational, and recognize and assume its grave responsibilities in the movement. The force of education when aimed at developing self-control, self-restraint and a habit of thought that will compel a submission of disputes to peaceful settlement, will be the principal factor by which the peace movement can achieve the success so earnestly desired.

Every actual instance of arbitration confirms the habit and rivets the bond of international peace. If people can be brought to realize that this is a better and more equitable method of adjusting their differences than by going to war, the problem of armaments will no longer trouble peoples and statesmen. When enlightened public opinion will compel governments to make use of the improved instrumentalities for removing causes of friction and settling controversies, nations will realize that enormous armies and navies are no longer necessary. It is to prove the absence of the necessity for such great armaments that peace congresses assemble. When this conviction makes its impress on the world, we will have reached the goal of international peace.

WASHINGTON, D. C.

EDWIN M. BORCHARD.

A REVIEW OF THE OPINIONS OF THE CHIEF
JUSTICE OF THE UNITED STATES IN THE
STANDARD OIL AND TOBACCO CASES.

The written opinion of Chief Justice White, of May 15, 1911, in the Standard Oil case, is printed on pages 30 to 82 inclusive, of Volume 221 of the United States Reports. The first twenty and the last twelve of those pages relate to the case. But the twenty pages which begin with line 12 of page 50, and end with line 12 of page 70, are all devoted to an argument on a question whether the word "unreasonable" or the word "undue" should be implied in the Sherman Law, so as to limit its prohibitions of restraint or of monopolization of interstate or of international trade or commerce, to such portions of such restraint or monopolization as may be "unreasonable" or "undue." That argument conducted the Chief Justice to the affirmative side of that question; and in reaching that result he made statements, the importance of which partly depends upon whether they are clothed with the sanctity of a judicial decision of the Supreme Court of the United States, or are only the *obiter dicta* of the Chief Justice; and partly depends upon whether they corroborate or contradict any previous decision of the Supreme Court upon the same subject; and partly depends upon whether they are sound or unsound, when considered as comprising an essay upon the subject to which they relate.

The written opinion of the Chief Justice of May 29, 1911, in the American Tobacco case, is printed on pages 142 to 188 of Volume 221 of the United States Reports. Those portions of that opinion which begin on page 142 and end near the bottom of page 178, and which begin near the bottom of page 180 and end with page 188, relate to the case. But that paragraph of that opinion which begins with

line five from the bottom of page 178, and ends with line 6 from the bottom of page 180, is devoted to an argument in support of those twenty pages in the opinion in the Standard Oil case, which extend from line 12 of page 50 to line 12 of page 70 of 221 U. S. Reports.

It is the purpose of this paper to analyze those two arguments of the Chief Justice, with a view to ascertain and show; first, whether they represent a decision of the Supreme Court, or only the *obiter dicta* of the Chief Justice; and second, whether they corroborate or contradict any previous decision of the Supreme Court; and third, whether they are sound or unsound in the eyes of history and of logic.

The distinction between the decision of a court and the *obiter dicta* of a judge, is known to all lawyers; but as this monograph is intended also for laymen, it is suitable to say that, a decision of a court, is its solution of a litigated controversy, and that an *obiter dictum* of a judge, is a statement of some idea upon which that solution does not depend. Any statement in a judicial opinion is therefore *obiter dictum*, if it could be reversed without affecting the decision of the case.

The opinion of Chief Justice White in the Standard Oil case, that the word "unreasonable" or the word "undue" should be implied before the word "restraint" and also before the word "monopolize," in the Sherman Law, can be reversed without affecting the decision of that case; because that decision found the Standard Oil Company guilty of restraint of interstate commerce, and also guilty of monopolizing interstate commerce, even if such restraint and such monopolizing is limited by the word "undue" or by the word "unreasonable," and because the removal of that limitation would not lessen the guilt of the Standard Oil Company, or logically lead to any change in the decision of the court. For these reasons, it is quite undeniable, that the decision of the Standard Oil case did not depend in the slightest degree upon the presence or absence of any

such limitation upon the statutory word "restraint" or the statutory word "monopolize," as Chief Justice White, in his six thousand word argument, sought to place upon those words; and for these reasons also, it follows that all those portions of his written opinion which appear to be intended to operate to thus limit those statutory words, are *obiter dicta*.

The case of *Carr v. United States*¹ was decided by the Supreme Court in 1879, in an opinion delivered by Justice Bradley, without any dissent from any other justice. That opinion contained an *obiter dictum* which was repudiated by a decision of the Supreme Court, which was made four years afterward, in the case of the *United States v. Lee*.² These two cases disclose the law relevant to *obiter dicta* so perfectly and so interestingly; that they ought to be generally understood.

The Carr case was an action in equity, brought by the United States in the United States Circuit Court for the District of California against Carr, to settle the question whether certain real estate in San Francisco, was the property of the United States, or was the property of Mr. Carr. The United States claimed that real estate, by virtue of its original appropriation for public use, by the military authorities of the Government in 1847, and also by virtue of a deed executed December 11, 1852, by the Mayor of San Francisco, under the authority of the Common Council of that city, the land having been "*pueblo*" land belonging to the municipality of San Francisco, prior to the American conquest of California. Carr claimed title to the real estate in controversy, through a deed from Thomas White, who had taken possession of the property in 1849, without having any paper title at that time; and also by virtue of an ordinance of the Common Council of San Francisco, of June 20, 1855, which relinquished to White and his grantees, whatever title the city had to the property at that time. But as the city had no title to the

¹ 98 U. S. 433.

² 106 U. S. 196.

property in 1855, having deeded it to the United States in 1852, it was apparent that Mr. Carr had no meritorious case.

In this situation of affairs, Mr. Carr sought to hold the property in controversy, by virtue of certain judgments which had been rendered in a California state court in 1865, in certain actions of ejectment, which had been brought in that court by parties in privity with him against Hastings and others, who held possession of the property as agents of the United States. Those agents were defended in those suits by the United States District Attorney for the District of California, on the ground that the United States was the real owner of the property. But the state court, having decided against the defendants on that question, rendered judgments in ejectment against the agents of the United States, and Mr. Carr invoked these judgments in the Federal Court as *res judicata*, and as establishing the title in him. But the United States Circuit Court in California in the first instance, and the Supreme Court of the United States, on Carr's appeal to that tribunal, decided that the judgments in the state court were not *res judicata*, because the United States was not a party to the cases in which those judgments were rendered; and also decided that the action of the District Attorney, in defending the defendants, did not bind the United States to the results of the suits. These two points were all the points which were decided by the Supreme Court in the Carr case.

But Justice Bradley inserted in the opinion which he rendered in that case, the following *obiter dictum*:

"In some cases (perhaps it was so in the present case), it might not be apparent until after suit brought, that the possession attempted to be assailed, was that of the government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court, and litigate with private parties in defense of its property."

This *obiter dictum* of Justice Bradley plainly stated that courts do not have jurisdiction to entertain actions of eject-

ment, brought to take away possession of real estate, from men who hold that possession as agents of the United States. The justices of the Supreme Court who were on the Bench when Justice Bradley delivered the opinion in the Carr case, were Chief Justice Waite, and Justices Clifford, Swayne, Miller, Field, Strong, Bradley and Harlan; Justice Hunt being absent by reason of indisposition. It afterwards turned out that Justices Miller, Field and Harlan did not agree with the Bradley *obiter dictum*. Neither of those three justices dissented from the judgment of the court in the Carr case, because they agreed it was correct; and neither of them dissented from the Bradley *obiter dictum*, because it is not customary for justices of the Supreme Court to dissent from *obiter dicta* inserted in opinions by other justices, except where they do not concur in the decision of the court. For this reason, the fact that seven justices did not take occasion to dissent from the *obiter dicta* of Chief Justice White in the Standard Oil case, does not prove that they concurred therein.

The case of the United States v. Lee³ was as follows: George Washington Parke Custis, the only stepson of George Washington, during his life owned the Arlington estate on the Potomac River, opposite the City of Washington. In his will, he devised that estate to his daughter, the wife of Robert E. Lee, for her life, and after her death to George Washington Parke Custis Lee, her son. When Virginia undertook to secede from the United States in April, 1861, the Lee family occupied that estate and lived in the Arlington mansion, which still stands in plain sight of the western terrace of the Capitol. After Virginia took that action, Robert E. Lee resigned his commission in the United States Army, and went to Richmond and drew his sword in defense of his state. During the next four years, Mrs. Lee was where she belonged, which was at her husband's side, away from her home and within the military lines of the Confederacy. During that absence, the United

³ 106 U. S. 196.

States, acting through its Congress and other agents, unwittingly executed a plan to deprive Mrs. Lee of the Arlington estate.

The execution of that plan commenced by an Act of Congress of June 17, 1862, entitled "An Act for the Collection of Direct Taxes in the Insurrectionary Districts within the United States," which act was amended on February 6, 1863. In pursuance of that act thus amended, certain citizens of the United States were appointed commissioners to execute it, in that portion of Virginia in which the Arlington estate was located. That execution was to consist in levying and collecting taxes upon the real estate in that portion of Virginia; and in default of payment of such taxes, then in selling the real estate upon which they were levied. Those commissioners prior to January 11, 1864, established, announced and uniformly followed a rule under which they refused to receive payment of taxes from anybody except the owners in person. Inasmuch as they were exercising their functions within the military lines of the Federal Army, and inasmuch as Mrs. Lee was with her husband, within the military lines of the Confederate Army, she could not go to the commissioners to personally pay the taxes due upon her estate. She therefore sent a Mr. Fendall, who appeared before the commissioners in due time as her agent, and who thereupon offered to pay the taxes, interests and costs which had accrued upon Mrs. Lee's estate. But the Commissioners refused to receive the money from Mr. Fendall, and told him that they would not take it from anybody but Mrs. Lee in person. Thereupon the commissioners sold the Arlington estate for non-payment of taxes; and that property was purchased at that sale by the United States, and the commissioners executed to the United States a certificate which purported to convey the property to that great nation. Afterward, the Executive Department of the United States Government, took possession of the estate and devoted about two hundred acres of it to be the last resting place of many thou-

sand of Federal soldiers, as a national cemetery, which they committed to the custody of an agent, Frederick Kaufman; while committing the custody of nine hundred other acres of the estate to another agent, Richard P. Strong.

The foregoing proceedings actually operated to deprive Mrs. Lee of her property throughout the remainder of her life; but after her death, her son George Washington Parke Custis Lee, brought an action in ejectment against Kaufman and Strong in the Circuit Court of Alexandria County, Virginia, to recover possession of the Arlington estate from them, without making the United States a party to that suit. Soon after the declaration was filed, the case was removed into the Circuit Court of the United States for the Eastern District of Virginia, and was tried there before a judge and a jury. That trial resulted in a judgment that the tax title which the United States invoked, was void; because the Commissioners had arbitrarily refused to receive the taxes from the agent of Mrs. Lee, and also because they had made their arbitrary rule to refuse to receive those taxes, unless they were tendered by Mrs. Lee in person. That trial also resulted in a judgment to the effect that the court had jurisdiction of the case, notwithstanding the fact that the defendants held possession only as agents of the United States. That judgment of the Circuit Court of the United States for the Eastern District of Virginia, was precisely contrary to the *obiter dictum* of Justice Bradley in the Carr case; and therefore the Attorney General of the United States took the case to the Supreme Court by means of two writs of error, one of which was prosecuted in the name of the United States and the other one of which was prosecuted in the names of Kaufman and Strong.

When that case came to be decided by the Supreme Court, that tribunal had to choose between depriving Mr. Lee of eleven hundred acres of valuable land, and of the house which had been the home of his father and his mother, or alternatively, repudiating the *obiter dictum* of Justice

Bradley in the Carr case. The majority of the justices of that court decided to repudiate that *obiter dictum*, and in harmony with the whole of his long judicial life, Mr. Justice Harlan was one of that majority. That repudiation is expressed on page 217 of 106 United States reports.

The judgment of the Supreme Court in the Lee case, affirmed the judgment of ejectment against Kaufman and Strong from the Arlington estate, which had been rendered by the United States Circuit Court for the Eastern District of Virginia. That judgment authorized Mr. Lee to require the United States to dig up the body of every Federal soldier which it had buried on the Lee estate, and to vacate forever the National Cemetery at Arlington. But he was a Virginian, and was a Lee, and was magnanimous; and because, and only because, he was magnanimous, those Federal soldiers are still sleeping in their Arlington graves.

The case of the United States v. The Trans-Missouri Freight Association⁴ was argued in the Supreme Court in December, 1896, and was decided in March, 1897. The decision of the court included five separate points of law, the second of which was as follows:

Section 1, of the Sherman Law applies to all combinations in restraint of interstate or foreign trade or commerce, without exception or limitation; and the prohibitions of that section are not confined to "unreasonable" restraints of such trade or commerce.

The case depended upon this point, for the court below had decided that Section 1 of the Sherman Law was limited to "unreasonable" restraint of interstate or foreign trade or commerce, and that the restraint which the defendants had exercised upon interstate commerce, was not unreasonable. The decision of the Supreme Court assumed that the court below had been right on that point of fact; but that decision held that the court below was wrong on that point of law. What the Supreme Court decided on that point

⁴166 U. S. 290.

of law was stated by Justice Peckham in the following perfectly clear and positive language:

"It is now, with much amplification of argument, urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute, it is not intended to include all contracts in restraint of trade, but only those which are in *unreasonable* restraint thereof. The term is not of such limited signification."

Chief Justice White was then an associate justice of the Supreme Court, and he wrote and filed a dissenting opinion of more than ten thousand words, which is printed on pages 343 to 374 inclusive, of 166 U. S., and in which he took the ground that the decision of the court was wrong, because the restraint of trade or commerce which is prohibited by Section 1 of the Sherman Law, ought to be limited by implication, to *unreasonable* restraint. The argument with which he supported that contention in his dissenting opinion in the *Trans-Missouri* case, is much longer, and much more complete and much less unconvincing, than his six thousand word *obiter dictum* in the *Standard Oil* case. But the two writings have the same import, which is that the prohibitions of the Sherman Law ought to be limited by implication to unreasonable violations of those prohibitions.

The case of the *United States v. The Joint Traffic Association*⁵ was argued in the Supreme Court in February, 1898, and was decided in that tribunal after eight months of deliberation, on October 24, 1898. That case involved the same question of the implication of the word "unreasonable" before the word "restraint" in the Sherman Law, that had been involved, and decided in the negative in the *Trans-Missouri* case. But the counsel for the defendants asked the court to reconsider that question, and

⁵ 171 U. S. 505.

to reverse the Trans-Missouri decision thereon; because in their judgment that decision was wrong. When attending to this request, in the course of his delivery of the opinion of the court in response thereto, Justice Peckham wrote the following paragraphs:

"The learned counsel while making this application, frankly confess that the argument in opposition to the decision in the case above named, has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it, nor is it necessary to repeat it."

"While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be secured by the presentation for a third time, of the same arguments, which have been twice before unsuccessfully urged upon the attention of the court."

"We have listened to them now, because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not a matter for surprise that we still are unable to see the error alleged to exist in our former decision, or to change our opinion regarding the questions therein involved."

For these reasons, the Supreme Court reaffirmed, in the Joint Traffic case the decision of the Trans-Missouri case, and again expressly decided that the word "unreasonable" is not implied in the Sherman Law, as a limitation on the statutory word "restraint."

All the Federal judges are bound by their oath of office to hereafter conform their decisions to what the Supreme Court decided in the Trans-Missouri case and the Joint Traffic case; although in so doing, they must decline to be governed by the *obiter dicta* of Chief Justice White in the Standard Oil case. For each of the judges of the Supreme Court, and each of the circuit judges and district judges of the United States, when he assumed the jurisdiction and duties of his office, took the following oath:

"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially dis-

charge and perform all the duties incumbent on me as judge (or justice) according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States; so Help me God."

Now it is one of the laws of the United States that the decisions of the Supreme Court of the United States on questions of law, are binding on all the Federal judges in all cases. This law of the United States is not recorded in any statute, and it has never been announced in any decision of the United States Supreme Court. But it is a law nevertheless, as will be seen to result from the following considerations:

We inherited the English law with the English language and literature, and the blood that flowed in the veins of our ancestors. Many parts of the English law were derived from the Roman law. For the common law of England, though it originated in the forests of north Germany, and was carried into England across the North Sea by the Germanic tribes who conquered and absorbed the ancient Britons, it was afterward extensively enriched and increased by parts of the Roman law, which went through France and through Normandy into England, across the English Channel with William the Conqueror and his Plantagenet successors.

The idea that a judicial decision in one case might establish a point of law to govern another case was not in ancient Germanic law, and does not reside in modern German jurisprudence. Thus the Prussian code which was promulgated by Frederick the Great to be a redaction of the *Gemeines Recht*, or common law of Germany, expressly prohibited the Prussian courts from being governed by judicial precedents. And in all the systems of jurisprudence which now prevail on the continent of Europe, the decision of one case has no binding force in any other court, or even in the same court, between new parties. But that is not the law of England or of the United States. In those two great English speaking nations, the binding force of judicial de-

cisions is prevalent, and was developed as follows, from the Roman law :

The Emperor Justinian in the sixth century of our era, united in his official functions, the supreme legislative, the supreme judicial, and the supreme executive department of the government of the Roman Empire. When exercising his legislative powers, he prescribed the character and scope of his judicial powers in the following law :

"Whenever the Emperor has judicially considered a case, and announced a decision to the parties who have appeared in the controversy, let all judges, without exception, within the imperial jurisdiction, know that this is the law, not only for the individual case in which it was rendered, but also in all like cases."

This Justinian rule, relevant to the binding force of supreme judicial decisions, was finally adopted in England during the time of the Plantagenet kings, and as early as the reign of Edward III in the fourteenth century. And Blackstone, in his Commentaries on the Laws of England, written four centuries later, stated that the House of Peers was then the Supreme Court of judicature in the kingdom and that every subordinate tribunal must conform to the determinations of that court, "the law reposing an entire confidence in all of the noble persons who compose it, that they will make themselves masters of those questions upon which they undertake to decide; since upon their decisions all property must finally depend."

It was this constitution of the Supreme Court of judicature in the United Kingdom of Great Britain, that was in existence at the time of the separation of the thirteen American colonies from the mother country, and at the time of our constitutional convention of 1787. That convention, the members of which must have been well acquainted with this point in the laws of Great Britain, inserted in the Constitution which it framed the following provision: "The judicial power of the United States shall be vested in one

* *Codex repetitae praelectionis*,
Liber I, Title XIV, 12.

† Blackstone's Commentaries, Vol.
III, Chapter IV., Section X.

Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”*

The use by the constitutional convention of the same words, “Supreme Court,” which were used in the then extant and well known Commentaries of Blackstone, to designate the House of Peers, clearly implies that the members of the constitutional convention intended those words to have the same meaning relevant to the judicial department of the government of the United States, that they were well known to have, relevant to the judicial department of the government of the United Kingdom. And that meaning expressly included the statement that every subordinate tribunal must conform its decisions, to the decisions of the House of Peers. Thus, the presence in Section 1, of Article III, of the Constitution of the words “one Supreme Court” in connection with the words “inferior courts,” plainly implies that the framers of the Constitution meant to provide that the decisions of the Supreme Court on questions of law, should be binding on the inferior courts which Congress was authorized, by that section, to establish.

When hereafter, the circuit and district judges of the United States make decisions in litigated Sherman Law cases, and make those decisions conform to the decisions of the Supreme Court in the *Trans-Missouri* case and the *Joint Traffic* case, those Federal judges will be conforming also to the judicial opinions of most of their own brethren, who have heretofore adjudicated similar cases.

For example, Circuit Judge Taft, in the case of the *United States v. The Addyston Pipe & Steel Co.*,⁹ in delivering the opinion of himself and of Justice Harlan and Judge Lurton, expressly stated that it had been held by the Supreme Court of the United States in the *Trans-Missouri* case, that contracts in restraint of interstate transportation were within the Sherman Law, whether the restraints would be regarded as “reasonable” at common law or not.

* Article III, Section 1.

85 Fed., Rep. 278.

The defendants in that case contended that they had exercised no restraint of trade or commerce, except upon each other, and that the restraint which they had thus exercised, was reasonable, because, without it, each of the defendants would be subjected to a ruinous competition by some or all of the other members of the combination, and because that restraint did not exceed either in scope or stringency, what was necessary to enable the defendants to obtain prices for their cast iron pipe, which were fair and reasonable to themselves and to the public.

Judge Taft met this contention by saying, for Justice Harlan and Judge Lurton and himself, that "We can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide, by ill advised competition, was void at common law because in restraint of trade, and tending to a monopoly."¹⁰ And Judge Taft also said, on behalf of Justice Harlan and Judge Lurton, as well as for himself, that "it is certain that if the contract of association which bound the defendants, was void and unenforceable at common law because in restraint of trade, it is within the inhibition of the statute, if the trade it restrained was interstate."¹¹

For another example, Judge Day, when he was one of the circuit judges for the Sixth Circuit, and when he was delivering the unanimous opinion of himself and Judges Lurton and Severens, relevant to the Sherman law, in the case of the Chesapeake & Ohio Fuel Company v. The United States,¹² inserted the following clear, comprehensive and conclusive paragraph:

"Is the contract in restraint of trade, within the meaning of the law? As we understand the decisions of the Supreme Court of the United States, the construction of the statute

¹⁰ 85 Fed. Rep. 291, lines 17 to 11 from the bottom.

¹¹ 85 Fed. Rep. 278, last three lines, and first two lines of page 279.

¹² 115 Fed. Rep. 617.

is no longer an open question. At the common law, contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts.¹³ By the Constitution of the United States, Congress is given plenary power to regulate commerce between the states and with foreign nations. In the exercise of this power, Congress may prevent interference by the states with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammelled flow of such trade. In the exercise of this right, Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal, if in restraint of trade or commerce among the states¹⁴

This review of the *obiter dicta* in the Standard Oil case has thus far treated that writing as representing the opinion of Chief Justice White only. But the writing itself implies that its views were also held on May 15, 1911, by a majority of the men who were then justices of the Supreme Court. Those views were immediately and emphatically repudiated from the bench, by Justice Harlan, and they were totally inconsistent with what had been adjudicated in the plainest terms by Justices Day and Lurton when delivering opinions of the Circuit Court of Appeals for the Sixth Circuit in Cincinnati. It is hardly possible that either of those two old and experienced jurists had really reversed their former opinions, particularly as nothing had been said or printed by counsel in the Standard Oil case, having the slightest tendency to induce such a reversal.

¹³ See opinion of this court, per Taft, Circuit Judge in *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. Rep. 271-279, 46 L. R. A. 122.

¹⁴ *U. S. v. Trans-Missouri Freight*

Assn., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136."

For these reasons, the most that can be inferred in favor of the hypothesis that the *obiter dicta* of Chief Justice White was representative of the opinion of the majority of the justices of the Supreme Court on May 15, 1911, is that it was representative of the opinion of the Chief Justice and of Justices Holmes, McKenna, Hughes, Van Devanter, and Lamar. But this number of possible concurrers must be still further reduced by reference to the fact that Justice Holmes in the dissenting opinion which he delivered in the Northern Securities case, in speaking of the Trans-Missouri case and the Joint Traffic case, said, "I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge."¹⁵

This reduction leaves Justices McKenna, Hughes, Van Devanter and Lamar, as the only associate justices of the Supreme Court, who could on May 15, 1911, indorse the *obiter dicta* of Chief Justice White in the Standard Oil case, without utter self stultification. This fact justifies the inference that those four associate justices at the most, were the only ones who concurred on that day in that deliverance.

But even if those *obiter dicta* did on that day represent the opinions of a majority of the nine justices of the Supreme Court, instead of the opinion of Chief Justice White only, that fact does not impart any legal significance thereto. For, as is explained in an earlier part of this review, the *obiter dictum* of Justice Bradley in the Carr case, appeared to represent the opinions of all of the justices who participated in hearing that case; but nevertheless, it was repudiated three or four years later by the Supreme Court in the Lee case, as having no binding force, and as being inherently wrong.

The arguments inserted by Chief Justice White in the opinions of the Supreme Court in the Standard Oil case and the American Tobacco case, to support his contention

¹⁵ 193 U. S. 405, lines 6 to 4 from the bottom.

that the word "unreasonable" or the word "undue" should be implied in the Sherman Law, so as to limit its prohibitions of restraint or monopolization of interstate or of international trade or commerce to such portions of such restraint or monopolization as may be "undue" or "unreasonable," have now been reviewed sufficiently to show that those arguments do not represent a decision of the Supreme Court, and are only the *obiter dicta* of the Chief Justice; and also to show that they contradict the previous decisions of the Supreme Court in the Trans-Missouri case and in the Joint Traffic Association case. It is now in order to analyze those arguments, with a view to ascertain whether they are sound or unsound, in the eyes of history and of logic.

The preface of the Standard Oil *obiter dicta* consists of a copy of sections 1 and 2 of the Sherman Law of July 2, 1890. That preface is followed by a recognition of the fact that the pivotal phrase in the first section is "restraint of trade," and that the pivotal word in the second section is "monopolize"; and that the meaning of the two sections can be ascertained by ascertaining the meaning of those pivotal parts of the two sections respectively. Thereupon the Chief Justice undertook to ascertain their meaning by reference to the relevant English and American law, as existing prior to the passage of the Sherman Act.

The first statement made by the Chief Justice in this behalf, is that at a very remote period, "restraint of trade" in England, came to refer to some voluntary restraint put by an individual on his right to carry on his trade or calling; and that originally such contracts were illegal, but that afterward this doctrine was modified so that only when a restraint was so general as to be coterminus with the kingdom, was it treated as void. But after making this clear statement, the Chief Justice purported to paraphrase it by a non-equivalent sentence in which he said that "if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid."

The difference between these two statements resides in the fact that according to the first one, no restraint of trade covering less than the whole kingdom was void; whereas according to the second one, such a partial restraint of trade had to be "reasonable" in order to be valid. No judicial or historical authority was cited by the Chief Justice in his Standard Oil *obiter dicta*, or in his Tobacco *obiter dicta*, to support either of these statements; and this paper will soon show that the Chief Justice was in error in both of them.

The Standard Oil *obiter dicta* next proceeds to quote from Lord Coke, his definition of the royal monopolies which were granted by Queen Elizabeth, but which were repudiated by act of Parliament as illegal, in the reign of James I; and the illegality of which has ever since been everywhere recognized. Thereupon, the Chief Justice said that "As monopoly as thus conceived, embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such."

Thus far, in his Standard Oil *obiter dicta*, the Chief Justice represents that in the time of Lord Coke, the only illegal "restraint of trade" was that which was coterminus with the kingdom, or was at least "unreasonable," and that the only recognized "monopolies" were those which were granted by the Crown. If the Chief Justice had been right on these two points, it would have followed that the common law of England, as it existed at the time of Lord Coke, did not prohibit any monopoly resulting from combinations between persons, however extensive that "monopoly" might be, and did not prohibit any "restraint of trade," unless that "restraint of trade" covered the whole kingdom, or if it covered less than the whole kingdom, was somehow "unreasonable."

Indeed on page 55 of Volume 221, United States Reports, the Chief Justice said that "It is remarkable that nowhere at common law, can there be found a prohibition against

the creation of monopoly by an individual." He was wrong on this point; because it had been held by one of the judges of England in the reign of Henry V,¹⁶ that a particular contract which was only partly monopolistic, was criminal; and had been held by another judge of England in the reign of Elizabeth, that a partly monopolistic combination of the Company of the Merchant Tailors of England was against the law¹⁷; and because the English Parliament in March, 1624, enacted a statute, the first section of which was devoted to declaring what was the common law of England upon the subject of "monopolies" and "restraints." That statute was approved by King James I on March 24, 1624, and its first section including the following enactment:

"Be it declared and enacted by authority of this present Parliament: That *all monopolies*, and all grants, licenses and charters heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate, whatsoever, *for the sole buying, selling, making, working or using, of anything within this realm or the dominion of Wales*, and all proclamations, inhibitions, *restraints*, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering or countenancing of the same or any of them; are altogether contrary to the laws of this realm, and so are, and shall be, utterly void, and of none effect and in nowise to be put in use or execution."

This act of the English Parliament, is better evidence than a dozen judicial decisions would be, of what was the common law of England relevant to "monopolies" and "restraints" prior to its enactment. For, as Blackstone explained in the first volume of his Commentaries, declaratory statutes of Parliament were always proper and effect-

¹⁶ Year Book 2, Henry V.

¹⁷ Davenant v. Hurdes, Moore's Cases, 576.

ive for avoiding all doubts and difficulties, and to declare what the common law is and ever hath been.

This statute of James I resulted from a general public opinion, which had been growing for more than fifty years in England, and which originated in discontent with the royal monopolies which were granted by Queen Elizabeth, to favorite subjects. But it is also true that when the statute of James I came to be drawn and enacted, it was not confined to *royal* monopolies; and was not confined to royal grants as means of creating or promoting monopolies, but included also all "*restraints*" and all other matters whatsoever, anyway tending to the instituting or strengthening of any monopoly whatever.

This statute of James I was not mentioned by Chief Justice White in his Standard Oil *obiter dicta*, or in his Tobacco *obiter dicta*; and there is one indication in his Standard Oil *obiter dicta*, that he had forgotten it, or at least did not realize its purport when he was writing that paper. That indication is found on page 57 of 221 United States Reports, and it consists in the statement that "The dread of monopoly as an emanation of governmental power, passed at an early date out of mind in this country, as the result of the structure of our government." This statement indicates that the Chief Justice supposed that it was our Federal Constitutions which put an end to the dread of monopoly, as an emanation of governmental power in this country; whereas that dread never existed in this country, and was ended in England one hundred and sixty-three years before the formation of our Federal Constitution, and in less than four years after the landing of the first English settlers on Plymouth Rock.

This statute of James I has never been repealed, and its first section has never been altered; and that section has always, during the two hundred and eighty-seven years of its existence, been recognized as truly representative of the common law of England on the subject of "monopolies" and "restraints."

The chief case cited by Chief Justice White in either of his *obiter dicta*, as indicative of the law of England on the subject of "restraints of trade" and "monopolies," is the case of the Mogul Steamship Company v. McGregor.¹⁸ This was a case decided by the House of Lords, one or two years after the enactment of the Sherman Law. The Chief Justice does not give any adequate account of the case; but he intimates that it distinguishes between "reasonable" and "unreasonable" restraints of trade, and imputes illegality only to those which are "unreasonable." The reader will find that view of the case is entirely wrong, as soon as he reads and understands that full and perfect explanation of the case, which was written by Judge Taft in 1898, in the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, in the case of the United States v. Addyston Pipe & Steel Co.¹⁹ In that Addyston case, Judge Taft explained the Mogul Steamship case as follows:

"It was a suit for damages, brought by a company engaged in the tea carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to customers dealing exclusively with the members of the association, and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the House of Lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46) and Lord Hannan, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade."

The Chief Justice does not, in either of his *obiter dicta*, cite any statute or decision of the United States, or of any state, of earlier date than the Sherman Law, for the purpose of showing what view was entertained by anybody in

¹⁸ Appeal Cases, 25.

¹⁹ 85 Fed. Rep. 286.

this country prior to that time, of the meaning of the phrase "restraint of trade" or of the word "monopolize," or for any purpose whatever. And it is in the total absence of any such citation, that he says on page 58 of Volume 221, U. S. Reports, that "the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conditions which obtained at the time the legislation was adopted, that contracts or acts, were at one time deemed to be of such a character as to justify the inference of wrongful intent, which were at another period thought not to be of that character." And the Chief Justice added to this statement of a non-existent survey of some imaginary legislation, the following statement: "But this again, as we have seen, simply followed the line of development of the law of England." Inasmuch as the Chief Justice had not indicated any line of development of the law of England, and had ignored that still existing parliamentary declaration of that law which was made in the statute of James I in 1624; and had not cited any statute or decision of the United States or of any state, which was made prior to the Sherman Law; it is apparent and undeniable, that up to this point in his Standard Oil *obiter dicta*, he had not thrown any light whatever upon the meaning of the phrase "restraint of trade," or of the word "monopolize," as those meanings were understood at the time the Sherman Law was enacted.

Though he had not laid any foundation whatever for the next step in the Standard Oil *obiter dicta*; Chief Justice White proceeded to take that step, in the following paragraph:

"Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute, which had at the time a well-known meaning at common law, or in the law of this country, they are presumed to have been used in that sense, unless the context compels to the contrary."

Thereupon the Chief Justice took the next step in his Standard Oil *obiter dicta* by taking the ground that the word "undue" should be implied before the word "restraint" in Section 1 of the Sherman Law, so as to limit its prohibitions of restraint of interstate or international trade or commerce to such portions of such restraint as may be "undue." The exact language by means of which he first expressed this idea in his Standard Oil *obiter dicta*, is printed on page 60 of 221 U. S. Reports, and is as follows:

"The statute under this view, evidenced the intent, not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce; but to protect that commerce from being restrained by methods, whether old or new, which constitute an interference, that is an *undue* restraint."

Having thus undertaken to limit the statutory word "restraint" by his own word "undue," on the supposed authority of an imaginary common law definition of the phrase "restraint of trade," Chief Justice White thereafter in his Standard Oil *obiter dicta*, once spoke of that imaginary common law definition as "the standard of reason," and twice spoke of it as the "the light of reason," and four times spoke of it as the "rule of reason." These three catch phrases appear to have been adopted and repeated by the Chief Justice, as means to intimate some intellectual superiority in himself, as the originator of the "undue" limitation upon the statutory phrase "restraint of trade," as compared with everybody who is not sufficiently self assertive to undertake to limit the scope of one of the statutes of the United States, by reference to his own imaginary notion of the pre-existing common law.

If the Chief Justice was going to carry to its logical conclusion, his undertaking to limit the scope of the Sherman Law, it was necessary for him to limit the word "monopolize" in Section 2 of that statute, after having thus limited

the phrase "restraint of trade" in Section 1. But to expressly take the ground that the word "monopolize" in Section 2, is impliedly limited by the word "unduly," would have been as unconvincing as it would be to attempt to limit the word "smuggle" in Section 2865 of the Revised Statutes by the word "unduly." What the Chief Justice did on this point, was to insert in his Standard Oil *obiter dicta* a long paragraph, beginning near the middle of page 61, and ending below the middle of page 62 of Volume 221 U. S. Reports. That paragraph is in many respects ambiguous; but it will yield up to a sufficiently patient study, the idea that the word "monopolize" in Section 2 of the Sherman Law, is impliedly limited by the word "unduly" or by the word "improperly."

The Standard Oil *obiter dicta* of the Chief Justice, does not in any one place, expressly state that the word "unreasonable" should be implied as a limitation upon the phrase "restraint of trade" in Section 1 of the Sherman Law, or as a limitation upon the word "monopolize" in Section 2 of that statute. But the *idea* of the word "unreasonable" as such a limitation, is conveyed in seven places in the Standard Oil *obiter dicta* by the word "undue" or by the word "unduly." And the fact that the Chief Justice used the words "undue" and "unreasonable" as synonymous, is shown in his dissenting opinion in the Trans-Missouri case, 166 U. S. 343. For in that case, he used the word "unreasonable" or its adverbial form "unreasonably" eight times, to convey the same idea which he conveyed in his Standard Oil *obiter dicta* in seven places, by the use of the word "undue" or the word "unduly."

The foregoing review of the Standard Oil *obiter dicta* of Chief Justice White, has shown that what the Chief Justice undertook therein to accomplish, was to insert the idea conveyed by the word "unreasonable" or "undue" before the word "restraint" in Section 1 of the Sherman Law, and also before the word "monopolize" in Section 2 of that statute; and that that undertaking was entirely based upon

his attempt to show that the phrase "restraint of trade" and the word "monopolize" were well known at common law, and in the law of this country in 1890, to be limited by that idea; and finally, that review has shown that that attempt was a necessary failure, because it was entirely unsupported by evidence.

The Tobacco *obiter dicta* of Chief Justice White consists in construing his Standard Oil *obiter dicta*. That construction is composed of a number of statements, which materially change the meaning of the Standard Oil *obiter dicta* in the following respects:

First. Though the Chief Justice, in the Standard Oil *obiter dicta*, repeatedly states that Section 1 of the Sherman Law is limited to acts which "unduly" restrain interstate or foreign commerce, and fairly implies that Section 2 of that statute is limited to acts which "unduly" monopolize such commerce; he states in the Tobacco *obiter dicta* that in the Standard Oil *obiter dicta* it was *not* held that acts which the statute prohibited, could be removed from the control of its prohibitions, by finding that they were "reasonable."

Second. Though in the Standard Oil *obiter dicta* he repeatedly uses the word "undue" or "unduly" to limit the statutory phrase "restraint of trade" and the statutory word "monopolize," and does not use the word "injurious" or the word "injuriously," for any such purpose; in the Tobacco *obiter dicta* he states that it was held in the Standard Oil case that the words "restraint of trade" at common law and in the law of this country, at the time of the adoption of the Anti-Trust Act, did embrace acts or contracts or agreements or combinations which "injuriously restrained trade," and that the words "restraint of trade" as used in the Sherman Law, did have that significance.

These two differences between the Standard Oil *obiter dicta* and the Tobacco *obiter dicta* of Chief Justice White, are significant; because they amount to a withdrawal in

the Tobacco *obiter dicta*, of the words "undue" and "unduly," and "unreasonable" and "unreasonably," as limitations upon the phrase "restraint of trade" and upon the word "monopolize" in the Sherman Law; and the adoption of the substantially different words "injurious" and "injuriously," as proper words to express how the Chief Justice now thinks that statutory language ought to be limited.

The Tobacco *obiter dicta* ends with the statement that "the rule of reason" which was applied in the Standard Oil case to the construction of the Sherman Law, is, in the most unequivocal terms, re-expressed and reaffirmed. But this statement is plainly erroneous, for the limitations placed upon the pivotal words of the Sherman Law in the Tobacco *obiter dicta*, are substantially different from the limitations placed upon the same statutory words in the Standard Oil *obiter dicta*. The statement in the Tobacco *obiter dicta*, that acts which the statute prohibits can *not* be removed from its prohibitions by finding that they were "reasonable," is not a reaffirmance of the statement in the Standard Oil *obiter dicta*, that such acts are outside of the statute if they are not "undue." And the statement in the Tobacco *obiter dicta*, that "injurious" restraint of trade is prohibited by the statute, is not a reaffirmance of the doctrine of the Standard Oil *obiter dicta*, that no restraint of trade is prohibited by the statute unless it is "undue" or "unreasonable." The difference between the word "unreasonable," and the word "injurious" in this behalf, resides in the fact that whether a particular transaction is "unreasonable," is a question of opinion; whereas the question whether a particular transaction is "injurious," is a question of fact. The word "undue" is also like the word "unreasonable" in being representative of an opinion, and not representative of a fact which can be proved or disproved by evidence.

But though the words of limitation which the Tobacco *obiter dicta* would insert in the Sherman Law, are substan-

tially different from the words of limitation which the Standard Oil *obiter dicta* would insert in that statute; the author of both those writings, practically asserts in the Tobacco *obiter dicta* that he understands that all those words of limitation have the same meaning. Inasmuch as they do not have the same meaning in the dictionaries, the question arises, what meaning they were intended to have in the Standard Oil *obiter dicta*, and in the Tobacco *obiter dicta*. That is a question which can not reliably be answered by anybody except the Chief Justice, and he has not publicly answered it yet.

The meaning of the Sherman Law, turns upon the meaning of its pivotal phrase "restraint of trade" in its first section, and upon the meaning of its pivotal word "monopolize" in its second section. Nobody can ever be punished for violating the Sherman Law, except for conduct which is inside of one or the other of those meanings. The question whether a particular instance of conduct is inside or is outside of the meaning of the phrase "restraint of trade" or the meaning of the word "monopolize," depends upon what limitations, if any, are to be attached to that statutory language. The Sherman Law itself does not attach *any* limitation thereto; but Chief Justice White seeks in his Standard Oil *obiter dicta* and in his Tobacco *obiter dicta*, to attach some limitation or other to the language of the statute. One of the reasons why he ought not to succeed, resides in the fact that his success would render the Sherman Law so indefinite, that it neither could nor should be enforced as a *penal* statute against anybody. Another such reason resides in the fact that, though his success would not make the Sherman Law entirely unavailable as a foundation for actions in *equity* against flagrantly injurious restraints of trade and flagrantly injurious monopolies; it would much prolong the proceedings in such actions, by obliging the Attorney General to plead and to prove that such restraints of trade or such monopolization, as might be charged against particular defendants, were in-

jurious to some particular person or persons, in some particular way; or were injurious, in some definite way, to the public at large.

This paper has thus far reviewed the *obiter dicta* of Chief Justice White in the Standard Oil case and in the Tobacco cases, with the same freedom that would be proper if those writings had been composed and published by an unofficial lawyer. This exercise of freedom was proper, because those *obiter dicta* are not clothed with the sanctity of a judicial decision of the Supreme Court of the United States, and have no binding authority on account of having been inserted between the effective parts of the decisions of the Supreme Court in the Standard Oil case and in the American Tobacco case, respectively. And the exercise of this freedom was necessary to a fundamental and thorough exposition of the subject; because where statements of opposing arguments are necessary to the reaching of correct results through debate, the debaters must be equally free to present their respective arguments, in the strongest forms consistent with their abilities.

It is not for writers to be judges of the power of their own writings; but when a writer feels that he has thought a problem through to its solution, and has expressed that solution upon his pages, it is proper for him to state what result he claims must follow that solution. Accordingly, it is herein claimed at this point, that the result of the foregoing criticism of the Standard Oil *obiter dicta* and the Tobacco *obiter dicta* of Chief Justice White, is destructive thereto, in that it deprives them of all foundation outside of his own unsupported ideas. In this view, nothing remains to be written here, except to set down some suggestions relevant to what reasons may have prompted Chief Justice White to compose his Standard Oil *obiter dicta* and Tobacco *obiter dicta*, and insert those writings between the parts of the decisions of the Supreme Court in those cases, respectively.

Whatever those motives may have been, they appear not

to have been explained to the other justices of the Supreme Court, when the members of that tribunal were in mutual consultation relevant to the Standard Oil case and the American Tobacco case; for Justice Harlan was one of those justices, and he inserted in his dissenting opinion in the American Tobacco case the following significant statements:

"Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word 'unreasonable' or 'undue.' All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple."

Nor did the Chief Justice state, in the Standard Oil case or in the American Tobacco case, why he inserted into the decisions of the court in those cases, those writings which Justice Harlan thus characterized as *obiter dicta*, and which are undeniably so. No suggestion has probably ever been made, and certainly none should be made or entertained, to express or imply any idea that the Chief Justice was actuated by any non-ethical motives in composing and promulgating his Standard Oil or his Tobacco *obiter dicta*. On the contrary, those motives were undoubtedly ethical, and were probably based upon the following sincere, though erroneous opinions, relevant to the science of economics.

First. Restraint of competition always constitutes restraint of trade; and would therefore always be prohibited by the Sherman Law, if the statutory phrase "restraint of trade" were to be construed without any limitation.

Second. Restraint of competition is in many cases economically wise and ethically proper; and when it is so, it ought not to be the subject of statutory prohibition.

Third. The only way to prevent the Sherman Law from prohibiting many cases of economically wise and ethically proper restraint of competition, is to construe the statutory words "restraint of trade" by means of some limitation which will confine those words to non-ethical restraint of trade, and that result can be accomplished only by limit-

ing them by some such word as "unreasonable," or "undue" or "injurious."

The line of argument suggested in the last three paragraphs has long been sincerely entertained by many excellent men, including Chief Justice White; but all of those men must have overlooked one particular gap in the argument, the undeniable existence of which quite vitiates its conclusion. That gap consists in the economic fact that restraint of competition never does, when it is ethical, result in restraint of trade, and therefore never falls within the unlimited statutory phrase, "restraint of trade" as that phrase is used in Section 1 of the Sherman Law.

The error which vitiates the argument above outlined, was implied in the celebrated illustration which Judge Lacombe inserted in his written opinion in the American Tobacco case, when that case was decided in the United States Circuit Court for the Southern District of New York. That illustration was as follows:

"Two individuals, who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition."

The judge was right in making that statement; but he was wrong in implying that that restraint of competition would constitute a restraint of trade, or would result in a restraint of trade, and would therefore violate the letter of the Sherman Law. For the case stated would not restrain trade at all. Indeed it would promote trade, by enabling one of the expressmen to manage both wagons, whenever the other expressman fell sick or was temporarily incapacitated by collision with an automobile or a street car. If the two expressmen, after making their combination, were to double their prices for transporting goods across the state line, and were thus to extort money from their customers by means of their combination, they would then and thereby restrain interstate trade, and would violate the Sherman Law by so doing. But that extortion would be plainly non-ethical, and could not morally claim exemption from the scope of that statute. So also, if the

two expressmen, after making their combination, were to reduce their prices for transporting goods across the state line, to one-half of their previous rates, and were to do this for the purpose and with the result of compelling a third expressman to sell his horse and wagon to them for whatever they chose to give, and thus enable them to monopolize the business, and afterward advance their prices again; they would then restrain interstate trade in that way, and would violate the Sherman Law by so doing. Such conduct would not in the first instance constitute restraint of competition, but would be a plain case of excessive competition, while also being an undeniable case of restraint of interstate trade, and would be so plainly non-ethical, as to constitute an undeniable violation of the Sherman Law.

The foregoing examples of radical differences between restraint of trade and restraint of competition, are simple illustrations of certain generally recognized and undeniable parts of the science of political economy. The fact that they were entirely overlooked by Judge Lacombe when he wrote his celebrated *obiter dicta* in the American Tobacco case, and were again entirely overlooked by Chief Justice White when he wrote his Standard Oil and American Tobacco *obiter dicta*, is to be accounted for by reference to the fact that no such subject was argued in court in either of those cases, and by the fact that Judge Lacombe and Chief Justice White were so largely occupied with other cases, at the time they composed their respective *obiter dicta*, that they did not themselves recall to mind those parts of the science of political economy, and did not have time to reason them out, as original thinkers in that science.

This interesting instance of able judges, when unaided by arguments of counsel, writing *obiter dicta* that cannot stand critical examination, but illustrates anew something which has been understood by many generations of English and American lawyers, when they have realized and asserted the unreliable character and legal insignificance of the *obiter dicta* of judges.

The Constitution of the United States imposes the law-making responsibility of the nation upon the Congress of the United States. The Congress of the United States carries that responsibility by means of the enactment of statutes which, before they are enacted, are the subject of public debates, between very able men in each of the two houses of Congress. The Sherman Law was the product of such debates, conducted day after day during weeks, between great lawyers in the Senate, followed by other such debates conducted day after day through other weeks, between great lawyers in the House of Representatives. During those debates, many conflicting propositions were advocated and defended; but the results of the intellectual contributions and intellectual conflicts of the great men of the Fifty-first Congress, was an agreement so nearly unanimous, that when the final draft of the Sherman Law was submitted to yea and nay votes in the Senate, the vote of Senator Blodgett of New Jersey was the only one given in the negative; and when the same draft was finally submitted to a yea and nay vote in the House, every one of the more than two hundred and fifty members present voted in the affirmative.

If the Sherman Law, thus debated and thus enacted by Congress, with the approval of the President of the United States, could be changed by means of any limitation upon its pivotal words, inserted in the statute by implication, as a result of secret deliberations of the nine justices of the Supreme Court; an instance would be presented of a law being framed to govern a nation of ninety millions of people, by nine gentlemen sitting in their private chamber, unadvised by other thinkers, and unguided by the crucial test of public debates. And those nine gentlemen, if asked to show their authority for thus prescribing rules of civil conduct to a mighty nation, would not be able to indicate where, in the Constitution of the United States, any such authority is expressed or implied.

EFFECT OF OVERRULING OPINION OF COURT OF LAST RESORT ON RIGHTS ACQUIRED ON OPINION OVERRULED.

From Blackstone we learned that when one decision overrules another it simply declares what always was the law from the beginning; that it does not make any new law, and that the people were always supposed to know that that had been the law from the beginning. In *Allen v. Allen*,¹ the court said that "although the ablest courts in the land find great difficulty in determining what the law is, every one is conclusively presumed to know the law."

Whether that rule is applicable in the United States presents an interesting subject. In England they had one court of supreme authority, making the rule somewhat easier of application than it would be in the United States where we started with thirteen states and now have forty-six, and, in addition to that, have a federal Supreme Court whose rulings are supreme in a certain class of questions. Not only that, but these different state courts in a way concern all of us, since, while the states are sovereign, and separate jurisdictions, yet they are political divisions of one greater common country where people are doing business with each other across all state lines and bringing themselves in contact with the laws of the different states, and become interested in the courts and decisions of the courts of all the states as if we were really citizens of each of those states. The difficulties, then, in this country resulting from overruled decisions are forty-seven times what they were in England, assuming that our courts only overrule the same ratio of decisions that are overruled in England. Therefore, this question is a very much more serious and practical question in this country than it could have been in England.

¹ 30 Pac. (Col.), 215, 216.

The constitutional limitations upon legislative action in this country, not found in England, have laid the foundation for the limitations being placed upon the courts in this country.

Having provided in the Federal constitution that no state legislature could pass an act impairing the obligation of a contract, it would necessarily educate the conscience, in the course of time, to believe that a contract made in reliance upon a decision of a court of last resort ought to secure some rights and should not be subject to be stricken down by an overruling decision. It early became a question in the Federal courts whether the contract impairment provision of the constitution extends to decisions also as well as acts of the legislature.

This question seems first to have arisen in an indefinite way, in 1847, in a decision written by Chief Justice Taney in the case of *Rowan v. Runnels*,² where he declared that a contract that had been made in reliance upon a decision of the Supreme Court of the United States, construing statutory and constitutional provisions of the State of Mississippi, which the Supreme Court of Mississippi, when the question finally came before it, refused to follow, should be protected and enforced notwithstanding the subsequent decision of the Supreme Court of the state on a question which was a local question of construction of its constitution and statutes. The question came up again in the case of *Ohio Life Insurance Co. v. Debolt*,³ where the opinion was again rendered by Chief Justice Taney and his announcement, by reason of the former announcement which he had made, was very full and clear, apparently with the satisfaction of the entire court—that the effect of an overruling decision upon a contract would be the same under the provisions of the constitution as the effect of an act of the legislature, and that the constitution extended in its provisions equally to an overruling decision as it did to an act of a legislature impairing the obligation of con-

² 5 How. 134.

³ 16 How. 415.

tracts. After this announcement similar announcements continued to be made in decisions of the United States Supreme Court running along through a number of years, coming down to 1864 when the case of *Gelpcke v. Dubuque*,⁴ went up from the United States Circuit Court in Iowa, and was decided January 11, 1864, after apparently very elaborate argument. The majority opinion was written by Mr. Justice Swayne. Mr. Justice Miller dissented in one of the most vigorous opinions he has written. The majority opinion sustained the announcement which had been made by Chief Justice Taney in the two preceding cases, and elaborated and confirmed the announcement. After that case the doctrine continued to be announced right along from time to time in the same way.⁵ In those different cases almost every member of the court wrote opinions from time to time, so that it received the approval, expressly, of substantially all of them,—Chief Justice Waite writing one, in the case of *Douglas v. Pike County*,⁶ where he went extensively into the question again, and Justice Field writing another, in the case of *Louisiana v. Pilsbury*,⁷ where he took an interest in elaborating the question and stated it in strong and vigorous terms.

Strange as it would seem, this doctrine as to the protection extended by the provision of the constitution to contracts made in reliance on decisions subsequently overruled, came up, nevertheless, later on and was absolutely overruled, but only to be revived again later. In the case of the *Central Land Company v. Laidley*,⁸ the doctrine is discussed again and a majority opinion written by Mr. Justice Gray distinguishing the prior cases, and Mr. Justice Field, who had written perhaps, the most recent of the opinions holding the other way, dissented. All prior cases had, as it so happened, gone up from the lower Federal

⁴ 1 Wall. 175.

⁵ *Havemeyer v. Bd. Suprs.*, 3 Wall. 295; *Mitchell v. City of Burlington*, 4 Wall. 270; *County of Lee v. Rodgers*, 7 Wall. 181; *City of Chicago v. Sheldon*, 9 Wall. 50; *Olcott v. Bd.*

Suprs., 16 Wall. 678; *Bd. Comrs. v. Thayer*, 4 Otto 631.

⁶ 101 U. S. 677.

⁷ 105 U. S. 278.

⁸ 159 U. S. 103.

courts to the United States Supreme Court, whereas this particular case was attempted to be brought up on error from a state supreme court which must involve a Federal question in order to entitle it to a hearing. While it was very strongly and clearly stated, from time to time, and repeatedly in the prior opinions, that they were based on Federal questions and that the overruling decision was an impairment of contract based on a prior decision within the meaning of the constitution, yet, in those same opinions, the question was also discussed on general principles of justice, and the court took advantage of that in the case of the Central Land Company v. Laidley, to say that all those prior decisions were based upon principles of general law and not on a Federal question and that they did not involve, necessarily, a Federal question because they came up from a lower Federal court and did not necessitate a Federal question as to impairment of contract, but that in this case of Central Land Company v. Laidley, the writ to a state supreme court could not be sustained, because there was no Federal question involved in the question of the rights of one who had made a contract in reliance upon a decision which was subsequently overruled.

After that announcement the decisions ran along in that line, and in many cases until the case of City of Los Angeles v. Los Angeles Water Co.⁹ That was a case, however, that went up from a circuit court so that the real question could not be presented, strictly speaking, but in the opinion written by Mr. Justice McKenna it is apparent from the language and the class of authorities cited that the mind of the court was changing upon the question; that, while the announcement there could not be any more than dictum, none of the Justices there seemed to care to take up the opposite side of the question, since the question was not really involved in the record.

This conception that the mind of the court was changing is confirmed in the case of Muhlker v. New York, Etc., R.

⁹ 177 U. S. 558; 20 Sup. Ct. Rep. 736.

Co.¹⁰ It was decided at the October term, 1904, and the writ of error was there sued out upon the ground that the decision of the Court of Appeals of New York overruling a prior decision violated the fifth amendment to the constitution in that it impaired the obligations of a contract which a party had made relying upon an earlier decision of the Court of Appeals of New York. That case brought the question right before the court again, and an opinion is there rendered of very great moment, the majority opinion being written by Justice McKenna, who had indicated five years before, that probably the court's opinion was changing upon this question, and this majority opinion declared an entire change and sustained the writ of error from the Supreme Court of the State of New York. Mr. Justice Holmes wrote a dissenting opinion concurred in by the Chief Justice and Justices White and Peckham. Mr. Justice Holmes, in his dissenting opinion, states that not only had the majority opinion reversed a long line of decisions with reference to the impairment of contracts by subsequent judicial decisions, but that, in addition, they had gone much farther and declared that rights other than those *ex contractu* were entitled to protection from overruling decisions and would justify writs directed to the courts of last resort of the various states, not mentioning under what provision of the constitution, but I presume under the due process provision of the fourteenth amendment.

This question came up again on another writ of error in *Sauer v. City of New York*,¹¹ from the same court, and while the writ was not sustained, yet in an opinion by Mr. Justice Moody, the doctrine of the *Mulker* case was clearly reaffirmed, indicating that the court will sustain a writ of error sued out in a proper case of that kind.

These two last cases may be more important in their collateral effect upon a question not expressly discussed than with reference to the question expressly considered. They

¹⁰ 197 U. S. 544.
Rear of 3803 Washington Avenue.

¹¹ 206 U. S. 536; 27 Sup. Ct. Rep. 686.

hold that a decision of a state court is a "law" within the meaning of the word in section 10, Article 1, Constitution, though it has been uniformly held since *Swift v. Tyson*,¹² that "law" as used in the thirty-fourth section, Judiciary act, 1789, includes some but not all decisions of the courts. Mr. Justice Field's able dissent from this holding in *Swift v. Tyson*, in *Baltimore, Etc., R. Co. v. Baugh*,¹³ anticipated and supported in *Hare on Constitutional Law*, now derives support from the *Mulker* case.

That outlines the course of the Supreme Court briefly upon this question and we find that, for a great many years, according to its holding in *Central Land Co. v. Laidley* and other cases the Supreme Court was protecting rights inhering in contract from the effect of overruling decisions, on general principles of law, not related to the provisions of the constitution. That being the case, we have eminent authority in a long line of cases to the effect that an overruling decision is not, in all cases, a declaration of what the law always was. It is so, as to people who have not acquired rights in reliance upon the decision overruled, but as to people who have acquired rights in reliance upon a decision overruled, there is a long line of Federal authorities to the effect that they are entitled to protection. This establishes an exception to the rule declared in *Blackstone*. Some discussions, I notice, have proceeded upon the basis that the doctrine of protection against overruling decisions reverses the principles announced by *Blackstone*. Such is not wholly true, nor true at all, except as to persons who have acquired some vested right relying on the decision rendered. Whether protection will extend farther than rights inhering in contract is not clear in the authorities, but it would be hard to understand why one right would occupy a different position from any other in that regard. If a man were to build a structure in accordance with a decision of his highest court, and that structure was prop-

¹² 16 Pet. 1.

¹³ 149 U. S. 371; 13 Sup. Ct. Rep. 915.

erly built, it would be hard to understand why he should not be entitled to as much protection in regard to negligent construction, as a party who had acquired some right, in reliance upon a decision inhering in contract. Mr. Justice Miller, in his dissenting opinion in the case of *Gelpcke v. Dubuque*, maintains that very clearly, and argued against the majority opinion because it extended the doctrine only to rights *ex contractu*, contending there was no reason or policy, why, if a right inherent in contract was entitled to protection, any other right should not be entitled to the same protection.

Going now, into the state courts, there are several where protection is given against overruling decisions, and these courts protect rights whether inhering in contract or not.¹⁴

The Supreme Court of Indiana overruled a decision construing language in a will, as to whether it created a life estate or fee simple absolute, and they protected purchasers relying on the decision overruled. In Alabama they have applied it to the power of a married woman to execute a mortgage. In North Carolina they applied it to the right of defense in criminal cases declaring that a man had a right to defend according to decisions of the Supreme Court at the time the alleged crime was committed and that while the overruling decision would be applicable as to all crimes committed after the decision was made, it would not be applicable as to crimes committed intervening between its announcement and the announcement of the prior decision. I happen to know of an interesting application of this doctrine by the Attorney General of the United States in crim-

¹⁴ *State v. Comptoir Nat'l D'Es-compte De Paris*, 51 La. Ann. 1, 26 So. 91; *Vt. Etc., R. Co. v. Vt. Cent. R. Co.*, 63 Vt. 1, 21 Atl. 262, 10 L. R. A. 562; *Farrier v. N. E. Mtge. Sec. Co.*, 92 Ala. 176, 9 So. 532; *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635; *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358; *Center School Twp. v. Bd. School Comrs.*, 150 Ind. 168, 49 N. E. 961; *Smith v. County of Clark*, 54 Mo. 58; *St. L. Etc., R. Co. v. Fowler*, 142 Mo. 670; 44 S. W.

771; *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. 161; *Whalley v. Gallard*, 21 S. C. 560, *Yazoo, Etc., R. Co. v. Adams*, 81 Miss. 90, 32 So. 937; *Hall v. Wells*, 54 Miss. 289; *Bradley-Courrier Co. v. Lall*, 10 Misc. 366, 31 N. Y. Supp. 120; *Hill v. Brown*, 144 N. C. 177, 56 S. E. 693; *State v. Bell*, 136 N. C. 674, 49 S. E. 163; *George W. Sheppard*, 2 Land Dec. 154; 9 Columbia Law Rev. 230; 22 Harvard Law Rev. 184; 38 Nat'l Corp. Rep. 862.

inal cases from the section of the country from which I came. It became a question there whether the treaty with the Nez Perce Indians allowed the selling of liquor on that reservation. A case involving that went to the Court of Appeals of the Ninth Circuit and that court held that liquor could be sold there and, under that decision, a great many men took out licenses over that reservation and engaged in business pending the review of the case before the Supreme Court. It was a long time before the Supreme Court reversed the decision of the Court of Appeals, holding that there had been no right to sell liquor on the reservation at all.¹⁵ After that decision of the Supreme Court the Attorney General instructed the United States attorney in Idaho not to prosecute the men who had taken out their licenses after the decision of the Court of Appeals, and who ceased business there after the announcement of the decision of the United States Supreme Court. This shows that the justice of this principle influences lawyers generally in their action.

City of Corvallis v. Stock,¹⁶ protects a lawyer or, rather, his client in the procedure which the lawyer had taken relying upon a decision which the court afterwards overruled, the procedure having been entered upon before the overruling of the decision. This question came up before the Court of Appeals of West Virginia in *Harbert v. Monongahela River R. Co.*¹⁷ and *Falconer v. Simmons*,¹⁸ where though they refused to approve the Oregon case, yet they protected the lawyer by sustaining the procedure which he adopted although apparently disapproving it. They theoretically condemned but practically adopted the Oregon rule. This rule has been applied in questions of procedure and in questions of criminal law and in questions of property rights generally, as well as questions of contract. The overruling decisions in this country makes the question one of great moment.

¹⁵ *Dick v. U. S.*, 208 U. S. 340, 28 Sup. Ct. Rep. 399.

¹⁶ 12 Ore. 391; 7 Pac. 524.

¹⁷ 40 S. E. 377.

¹⁸ 41 S. E. 193.

There is quite a temptation for a state supreme court, since the doctrine is extended to them by the Federal court, to now adopt the principle as a general principle of law as against the decisions of the Federal Supreme Court. There is one decision, couched in some such sentiment as that, written by Chief Justice Ryan, of the Supreme Court of Wisconsin, in *Drake v. Doyle*,¹⁹ where an individual had made a contract in reliance upon some decision of the United States Supreme Court which was afterwards overruled. Chief Justice Ryan referring to the case of *Gelpcke v. Dubuque*, declared that if the doctrine which the Federal Supreme Court had been extending to overruling decisions of the state supreme courts was correct, it would certainly be very proper for the state supreme courts to extend the same protection to individuals who were suffering from overruling decisions of the Federal Supreme Court.

What the effect of the general adoption of these principles would be becomes an interesting question. It seems to me it would diminish litigation. The main objection to overruling erroneous decisions has been that it would unsettle titles. Would not the new rule afford an opportunity of correcting admitted errors in the law without danger? The application of the rule will cause increased interest in the publication of decisions and raise important questions as to the date they become effective—as to which some regulation might be necessary. It might tend toward brevity and the elimination of *dictum* from opinions.

There is another application of this doctrine. Even if a court should refuse to protect rights acquired under decisions that are overruled, as a general proposition of law, the same court might not refuse to dismiss a case brought to attack those rights in a case exclusively of equitable cognizance. Especially might they refuse relief in a court of equity, to a litigant of a speculative character, one who acquired his rights for the purpose of litigation, after the overruling decision was rendered, with full knowledge that

¹⁹ 40 Wis. 175.

his antagonist whom he attacks had made his investment or incurred his liabilities in reliance upon the overruled decision. A court of equity might well protect one who has acquired rights relying upon the overruled decision as against one who did not acquire his rights with which to attack him, until after this overruling decision was rendered.²⁰

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²⁰ See *State v. Comptoir*, 51 La. Ann. 1, and *Vt. & Can. R. Co. v. Vt. Cent. R. Co.*, 63 Vt. 1. Since the above was written an interesting article on the subject has been published in the *Illinois Law Review* (Oct.-Dec., 1909). See also *Herron v. Castings Co.*, 92 N. E. 555 Ind.,

as to the time after the rendition of an opinion that it must and may be relied on and the necessity of publication and the effect of a petition for rehearing. This case is justly criticised in 71 Cent. L. J. 350.

CURRENT TOPICS AND NOTES.

OUR CONTRIBUTORS.—EDWIN M. BORCHARD, of the New York bar, the author of the article, "The Legal Evolution of Peace," is a graduate of Columbia College, where his post-graduate work in International Law was also done. In 1910 he was appointed expert in International Law to the American Agency in the North Atlantic Coast Fisheries Arbitration at The Hague. Mr. Borchard is now the Law Librarian of Congress and the Supreme Court at Washington. He is the American editor of the *Bibliography of Legal Science*, published at Berlin, and is associate editor of the *Comparative Law Bulletin*, of the American Bar Association. His *Critical Surveys of Foreign Legal Literature* are soon to be published by the Library of Congress. Mr. Borchard is a frequent contributor to American and foreign legal periodicals. The article printed in this number is a revision of an address delivered in Baltimore, May 3, 1911, at the Third National Peace Congress.

ALBERT H. WALKER, whose article in this number upon the opinions of Chief Justice White in the Sherman Law cases, is a law author and law lecturer, whose offices are in New York City, but whose practice has extended into most of the states of the Union, including Maine, California, Minnesota and Alabama, and whose law books are the leading works on the topics which they treat. He was a law lecturer in Cornell University from 1889 to 1905, and has been a law lecturer in the University of Michigan ever since 1896. His first law book was *Walker on Patents*, which has been the standard work on that subject in the United States since 1883, and his last law book is *Walker's History of the Sherman Law*, which was published in 1910, and is everywhere recognized as the standard work on that subject. He has also, during more than thirty years, been a platform orator on many topics, political, scientific and historical.

JAMES E. BABB, the author of "The Effect of an Overruling Opinion," is a practitioner in Lewistown, Idaho, where he has lived since 1892, and before this he had been a member of the bar of Chicago, Ill., for eight years. He is a graduate of the Northwestern University Law School, has been president of the Idaho State Bar Association and a member of the general council of the American Bar Association. He is a frequent contributor to journals of law, political science and jurisprudence.

THE AMERICAN BAR ASSOCIATION.—The thirty-fourth annual meeting of the American Bar Association was opened in Boston, Mass., on August 29, and extended over four days. The notable events were the addresses of President Taft, President Farrar of the association, and Mr. W. B. Hornblower of the New York Bar, the endorsement by a unanimous vote of the report of the special committee on Delay and Unnecessary Cost in Litigation, and the approval by an almost unanimous vote of a resolution against the judicial recall. President Taft spoke strongly in favor of law reform, of higher salaries for the judges, and suggested that the new Court of Commerce might be made a final court of appeal in patent cases. The president of the association, Edward H. Farrar, of New Orleans, denounced in vigorous terms the recall of judges by popular vote, and the idea of a federal commission to fix prices of merchandise. He favored the limiting of the capital stock of national banks and the prohibition of consolidation of such banks or of their control by any corporation. He reviewed the corporation laws of the various states, and contended that the people themselves are responsible for the conditions of which they now complain.

"To my mind," he said, "the most vicious of all the provisions in the statutes above enumerated is that authorizing one corporation to own and vote stock in another. This provision is the mother of the holding company and the trust. It provides a method for combining under one management and control corporations from one end of the nation to the other. Concerted action among the states will end all the trouble. If every state in the Union will purge its corporation laws of all objectionable features, then the breeding places of industrial monstrosities are destroyed."

Mr. Hornblower's address was devoted to the Sherman law. He argued that the statute never has been and never can be literally and strictly applied. To so apply it would produce chaos in the business world. The statute must be applied not according to its language, but according to its reasonable meaning or else it becomes the instrument of injustice and of ruin to the mercantile community. He approved the decisions of the Supreme Court in the recent Standard Oil and Tobacco cases; but did not like the criminal features of the Sherman Law. "Public opinion," he said, "appears now to be clamoring for victims. It is not satisfied with damages or injunctions or possible receiverships, but punishment of individuals is loudly called for. Protests are even made against mere pecuniary fines. Actual imprisonment of the offenders is demanded.

"For myself, and at the risk of being out of accord with the present state of public sentiment, I do not hesitate to say that the sweeping penal provisions of this law are unwise and unjust, and should be made more limited in their scope and much more definite and certain. Penal statutes involving personal punish-

ment which are not based on moral distinctions are wrong in principle. There may be and frequently are acts of moral turpitude committed in the creation or in the conduct of combinations in restraint of trade. Such acts of moral turpitude, if properly defined in advance, may well be made criminal. Such acts of moral turpitude are, for instance, the use of unfair means to suppress competition and to crush out rivals, and agreements with competitors to raise prices or to restrict production. To make 'restraint of trade' criminal, irrespective of its character and purposes and irrespective of the methods pursued to accomplish the restraint, is to punish alike the intentional malefactor and the honorable and upright business man who has been guilty only of a technical violation of a prohibitory law." Stephen S. Gregory, of the Chicago bar was elected president of the association for the coming year.

THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY held its annual meeting in the same week as the American Bar Association, and at the same place. The president, N. W. McChesney, of the Chicago bar, made the opening address and the annual address was delivered by Dean Kirchway of the Columbia Law School.

THE NEWCASTLE MURDER CASE IN ENGLAND—A SIDE VIEW.—In the civil side of the English High Court one has an example of the speed and certainty with which English justice marches. The murderer, whose trial is recorded in this issue,¹¹ had not been apprehended when an action was brought by the widow of the victim for compensation under the English statute from his employers, the Stobswood Coal Company, for the death of her husband. The statement of facts showed that Nisbet, in respect of whose death the action was brought, was a workman to whom the act applied; that he was in the employment of the respondents at the time of his death and was in receipt of £2 15s. a week; that his death took place on March 18, 1910, whilst in the execution of his duty when he was carrying money to Stobswood Colliery on behalf of the respondents in a railway carriage on the North-Eastern Railway; and that his death was caused by pistol or revolver shots fired by some one other than Nisbet himself. The County Court judge held that the risk undertaken by Nisbet in carrying a large sum of money was a risk incidental to his employment, and likely to have been in the contemplation of the parties when Nisbet was engaged, and he accordingly made an award in favor of the applicant for £300. The respondents appealed.

¹¹ *Ante*, page 641. "A Trial for Murder in England."

On July 13, 1911, just ten days after the appeal of the murderer was determined in the English Court of Criminal Appeal, the case came on for final decision in the Court of Appeal, which dismissed the appeal, holding that the death arose out of the employment of Nisbet, as required by the statute, to render the master liable. The Master of Rolls said:

"It is contended by the employers that this was not an 'accident' within the meaning of the act, because it was an intentional felonious act which caused the death, and that the word 'accident' negatives the idea of intention. In my opinion this contention ought not to prevail. I think it was an accident from the point of view of Nisbet, and that it makes no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet. The point was incidentally decided by this court in 'Challis v. London and Southwestern Railway,' 1905, 2 King's Bench 155, where an engine driver was injured by a stone wilfully dropped on a train by a boy on a bridge. The very recent case of 'Anderson v. Balfour,' in the Court of Appeal in Ireland, is a direct decision on the point. A gamekeeper was attacked by three poachers and wounded. The majority of the court held that the gamekeeper was entitled to the benefit of the Act, notwithstanding that the act of the poachers was criminal and done with wilful intention.

"It remains, however, to consider whether the accident arose not only 'in the course of' the employment, as it clearly did, but 'out of' the employment. This really depends upon the nature of the man's duties and the extent to which those duties involved him in special risk. In the case of the gamekeeper above referred to it was held, and I think rightly, that his employment was necessarily attended with special risk of assault by poachers. The only question which caused doubt in my mind is whether, in the discharge of his duties, Nisbet was exposed to special risk. Upon the whole I think he was. A man who is known to be carrying a bag of money is a tempting object for criminals to attack. In old days, when highway robberies were more frequent, this would not have been doubted. The case of "Andrew v. Fallsworth Industrial Society" (1904, 2 K. B. 32) is an important authority on this point. Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than the ordinary normal risk, the extra danger to which the man is exposed is something arising out of his employment. Thus a workman who was killed by lightning while working on a high scaffolding was held to have met his death by an accident arising out of, as well as in the course of, his employment. The learned county court judge has found that the fact that Nisbet carried the money in the bag was the reason why the robbery and the murder were committed, and that this was a risk incidental to the employment of a man to carry money about, and that it has been so from the earliest times. In my opinion the learned county court judge was justified in that finding."

And Lord Justice Kennedy, concurring, said:

"The murder of the deceased cashier undoubtedly happened in the course of his employment. I am of opinion that it also arose out of his employment. As cashier he was habitually entrusted with the personal duty of travelling to and fro with large sums of money for the payment of his employer's workmen. Thereby he became specially subjected to the risk which caused his death—the risk of personal violence inflicted upon him in order to rob him of that money. . . . An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact. Nor does it much help the respondents that Lord Coke has said

in the passage referred to by the learned county court judge (I am not quoting the exact words) that equity would extend indulgence to the non-production of documents, otherwise necessary, if the non-production was due to the robbery of them, and therefore to be excused as accidental. But whilst the description of death by murderous violence as an "accident" cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, "any unforeseen and untoward event producing personal harm," than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it.^{11a}

MONOPOLY—CONTRACTS TO SELL AT FIXED PRICES.—A very important decision and one that is receiving much criticism among the mercantile community, is that made by the Supreme Court of the United States, in the recent case of *Dr. Miles Medical Co. v. John D. Park Co.*¹² The plaintiff manufactured proprietary medicines which it sold only under an extensive system of contracts with wholesale and retail druggists. The wholesalers, under contracts which purported to make them agents, agreed to resell only to designated retailers at fixed prices. The designated retailers bound themselves to maintain the prices set by the plaintiff. The Supreme Court of the United States holds that this system of contracts is invalid as in restraint of trade.

It is well settled that contracts between competing dealers fixing prices are in restraint of trade and invalid and the only question here was, was the system of contracts between the manufacturer and the many competing dealers, which quite as effectively restricted competition between the dealers, any better or any more legal? Such contracts had been already described by Mr. Justice Lurton, while a circuit judge, as follows:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."¹³

The first contention made by the plaintiffs was that the article in question was a proprietary medicine made under a secret

^{11a} *Nisbet v. Rayne*, K. B., Div. 689 (1910).

¹² 31 S. C. Rep. 376.

¹³ *John D. Park Sons v. Hartman*, 153 Fed. 24.

formula, but this was swept aside with little attention, the court ruling that a restraint of trade which would be unlawful as to other manufactured articles cannot be justified because the article in question is a proprietary medicine made under a secret formula. Mr. Justice Hughes, who delivered the opinion, then proceeds to state the broad ground for the court's position, viz., that the law looks with disfavor upon any restraint upon the alienation of property, saying:

"The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer. But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in 2 Coke on Littleton, § 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man.'"

And he concludes:

"The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privileges or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

UNLICENSED PHYSICIAN NOT ENTITLED TO DAMAGES FOR LIBEL. —In a late case, in Washington,²⁰ it was ruled that one practicing as a physician without a license, and having upon his office door the words "Dr. C. F. Lathrop, Osteopathic Physician," in violation of a statute making it a misdemeanor, punishable by a fine or imprisonment or by both, for a person to maintain "an office

²⁰Lathrop v. Sunberg, 113 Pac.574.

or place of business with his or her name and the words . . . 'Doctor' in public view" without having obtained and filed a license as provided by law, could not successfully maintain an action of libel against persons who he claimed had charged him in a newspaper article with being a quack and charlatan, thereby injuring his business. The court said that a litigant will not be permitted to recover damages because he has been prevented from pursuing his business in violation of the laws of the state.

DUTY OF HOTELKEEPER AS TO GAS FIXTURES.—The traveling public will be pleased to hear that there is judicial authority for making a hotelkeeper keep his gas fixtures safe so that his sleeping guests shall not be asphyxiated. In a late case in North Carolina,²⁷ the plaintiff stopping at defendant's hotel, in Washington, was assigned to a room, and went to bed about eleven o'clock. The hotel was lighted by gas, and the plaintiff's room had a gas burner with no stop or safety pin in it, so that the key was loose and could be turned all the way around. He turned out the gas carefully and discovered that there was no stop pin, and he then turned the key at the place where it should stop, and he could smell no gas. Then he went to bed. During the night he woke up almost asphyxiated, but managed to reach the door, and called for help. A verdict for damages is affirmed, the Supreme Court, saying:

"There has been considerable discussion by judges and text writers as to the liability of an innkeeper for personal injuries sustained by a guest. Cases are to be found where the innkeeper has been held liable for assaults by servants, and cases *contra*. But it seems now to be well settled that in case of an injury occurring in consequence of the unsanitary and defective condition of the inn premises or room to which a guest is assigned, the innkeeper is liable upon the same principles applicable in other cases where persons come on the premises at the invitation of the owner or occupant and are injured in consequence of their dangerous condition. The innkeeper is not an insurer of his guests' personal safety, but his liability does extend to injuries received by the guests from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. . . . When the plaintiff proved the unsafe and defective condition of the gas fixture, in consequence of which gas escaped during the night and injured him, he made out a *prima facie* case of negligence, which it was defendant's duty to answer. . . . It is undoubtedly true that if the defect is an obvious one, the guest must use reasonable care on his part, and if he is himself negligent and could have avoided the injury by due care he cannot recover."

ICE AS BAGGAGE.—A very small case requires the examination and application of old principles. An interesting illustration of this is found in a recent case in South Carolina. A man pre-

²⁷ Patrick v. Springs, 70 S. E. 395.

sented himself as a passenger of a railroad with five cents' worth of ice, which he was carrying to a sick friend. The conductor would not permit him to take the ice on board, because it was melting, he said, and would wet the floor of the car, but as the jury found that this was not so, but that, on the contrary, the ice was contained in a thick bag, the railroad company in the Supreme Court was obliged to maintain that the ice was not baggage. But the court ruled otherwise, saying:

We cannot say as matter of law that a small piece of ice carried under the circumstances stated is not personal baggage. But the rule of the defendant company and the instructions given to its conductor assume that it may be so regarded under certain circumstances. Rule No. 16 of the defendant company for carrying packages provided, "Passengers must not be allowed to carry bulky or dangerous packages aboard cars," and the verbal instructions to conductor were not to accept anything like ice which was not wrapped or boxed so as to prevent melting or leaking over the floor. Hence the rules of the company did not prevent the acceptance as baggage of a small piece of ice wrapped so as not to leak over the floor."²⁸

POWERS OF SCHOOL BOARDS—EDUCATION INCLUDES BODILY HEALTH.—In a Minnesota case, the financial authorities of a city objected to paying a woman, a graduate nurse, who had been employed by the Board of Education of Minneapolis, to inspect the physical condition of the pupils at the public schools, and she had to obtain a mandamus against the city comptroller. In granting it the Supreme Court pointed out to the city officials that "education of a child means much more than merely communicating to it the contents of text-books. But, even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study each child is capable of. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. And this is peculiarly true of children whose immaturity renders their mental efforts largely dependent upon physical conditions. It seems that the school authorities and teachers coming directly in contact with the children should have an accurate knowledge of each child's physical condition, for the benefit of the individual child, for the protection of the other children with reference to communicable diseases and conditions, and to permit an intelligent grading of the pupils."²⁹

A HOUSE NOT PATENTABLE.—A peculiar question under the patent laws has recently been presented in the Federal courts of California.³⁰ The complainant claimed a patent for "an apartment house and disappearing bed." The essential features of the invention are the construction of adjacent rooms in an apartment

²⁸ McIntosh v. R. Co., 69 S. E. 160.

²⁹ Am. Disappearing Bed Co. v.

³⁰ State v. Brown, 128 N. W. 294.

Arnealsteen, 182 Fed. 324.

house in such a way that in one of the rooms, by the use of a double floor, a recess is created, into which a bed from the adjoining room may be stowed when not in use, thereby closing the opening between the rooms in such a way as to leave no suggestion of a bed. In holding the claim not patentable, the court says:

"Patents may be obtained for any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement. It is claimed that the invention in the present case comes within the term 'manufacture,' when that term is given the liberal construction which accords with the genius and purpose of the patent laws. But it clearly would be an undue expansion of the word 'manufacture' to hold that it includes the construction of a house, or of any room or recess in a house. As used in the patent laws, manufactures comprise articles or implements made by human agency from raw or prepared materials. It would be a gross misuse of the word to say that a house, or a room in a house, is manufactured. While many devices and many novel combinations of materials used in the construction of houses are within the protection of the patent laws, it has never been held, so far as we are advised, that any particular form of construction of a room in a house, or of a recess in a room, is patentable, whether considered by itself or taken in combination with any conceivable use to which it may be put."

In *Jacobs v. Baker*, the Court was of the opinion that a jail cannot be considered a machine or a manufacture or a composition of matter within the meaning of the patent act.³¹ In *Crier v. Innes*,³² the patent was for a sarcophagus monument, constructed of four parts. Answering the contention that the patent was invalid, because it related to a monument, which was not a "manufacture" within the meaning of the patent law, the court said: "We think this contention is not well founded. A monument is manufactured, and in our opinion is a 'manufacture,' and not—as urged by the defendants—a species of architecture. It comes within the dictionary definition of the former term, and if we go beyond that, and look at trade usage, we find in the present record the defendants' own witnesses describing themselves as monument 'manufacturers,' and speaking of 'manufacturing' monuments."

INSURANCE POLICY—FAILURE OF COMPANY TO MAKE LOAN—SUBSIDIARY PROMISE.—The distinction between a promise which goes to the root of the agreement and whose breach entitles the other party to rescind and a promise which is merely subsidiary and whose breach gives no such right is illustrated in a recent case in the Federal Court of Appeals.³³ In this case there was a provision in a life insurance policy giving the insured the right to borrow money from the insurer on the security of the policy in progressive sums as the policy aged. This the court held was not an indivisible part of the contract, but created a subsidiary or collateral contract, a breach of which can be compensated in

³¹ See *Fond du Lac Co. v. May*, 137 U. S. 395.

³² 170 Fed. 324.

³³ *Lewis v. Ins. Co.*, 181 Fed. 433.

damages; and such a breach by the insurer was not a repudiation of the contract for insurance, which would entitle the insured to rescind and recover the premiums paid. Said the court:

"The plaintiff had no right to throw up the policy and sue for the premiums simply because the company failed to honor, offhand, the additional loan required of them. The refusal, under the circumstances, cannot be said to have evinced an intent not to be bound by or live up to the terms of the contract, if that is the criterion. Indeed, it is a question whether, rightly considered, there was a refusal at all; the plaintiff not having given time for it. And much less can it be said that, the company having broken one part of the contract, there was no assurance that they would regard the rest of it, which magnifies the breach out of all proportion to its real significance. The fact is that the agreement for a loan was merely subsidiary to the main purpose of the policy, which was to insure the plaintiff for the benefit of the party designated; the right to a progressive loan as the policy aged, being an accommodation altogether secondary and subordinate, valuable, no doubt, but not vital.

"It certainly was no more important than the right, under certain conditions, to a paid-up policy; and yet it has been held, in numerous cases, that the breach of this provision does not entitle the insured to recover the premiums paid as upon a rescission. The same ruling was made with regard to the refusal to permit a change of the beneficiary. And the failure to return a part of the premiums, as agreed in the policy. It is true that, in each of these cases, the action was for damages for a breach of the contract, and not in terms for the premiums. But it was held in each, which is the significant thing, that the premiums were not a measure of the damages. The case of *N. Y. Life Ins. Co. v. Pope*³⁶ is also in point, the suit there being for a rescission and a recovery of the premiums, on the ground that there had been a refusal of a loan by the company, in violation of the policy; but it was held that the plaintiff was only entitled to damages. It is true that, in *Key v. Insurance Co.*,³⁵ the policyholder, on the refusal of a loan, was allowed to rescind and recover the premiums. But, as an inducement to take out the policy, there had been an express agreement in that case to make a loan on certain personal property, with the policy as collateral; and this being the inducement which moved the plaintiff to insure, the refusal went directly to the consideration. The case is thus to be distinguished from the ordinary one, where, as here, the agreement for a loan is merely an incident; the opportunity afforded by it not being the moving cause for taking out the policy. And, except as so distinguished, the case does not meet with our approval. It is urged, however, that this court, in *Supreme Council v. Black*,³⁸ sustained the right to rescind and recover back the premiums where there has been a breach of the insurance contract. But the attempt there was to cut down the policy, by an amendment of the by-laws, from \$5,000 to \$2,000; the company deciding that this was the highest amount for which thereafter a policy should issue. This, as was said of a similar attempt in *Becker v. Berlin Ben. Soc.*,³⁷ was a repudiation, pure and simple, there being an entire abrogation of the existing policy, and the substitution of another and very different one; the amount of insurance being reduced over one-half from that on which the insured had been paying premiums. Going as this did to the root of the contract, the insured was not obliged to submit, but had the right, as it was held, to rescind and sue for what he had paid on it. It is not at all like the present case, where, if there was any breach, it was merely of a minor feature."

³⁵ 68 S. W. 851, 24 Ky. Law Rep. 485.

³⁶ 107 Iowa, 446, 78 N. W. 68.

³⁷ 123 Fed. 650, 59 C. C. A. 414.

³⁸ 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624.

ORIGIN AND MEANING OF ASSUMPTION OF RISK.—The earliest reference to assumption of risk that a somewhat cursory examination discloses appears in the case of *William v. Taylor*,³⁸ decided in June, 1836. The court said that the "servant takes upon himself the risk of accidents and injuries from causes of which he has knowledge." The next reference in order of time occurs in the leading case of *Priestly v. Fowler*,³⁹ with which all are familiar. Next in order comes the case of *Murray v. South Carolina R. Co.*,⁴⁰ decided by the South Carolina Court in February, 1841. The court cites no authority nor does any appear in the argument of counsel but from expressions used in the opinion it seems probable that the court was cognizant of *Priestly v. Fowler*. Next in time is *Farwell v. Boston, Etc., R. Co.*,⁴¹ decided by the Massachusetts Court in March, 1842. This is the great leading case upon the subject, and has been cited in innumerable instances. An inspection of the report of the case shows that the court had before it *Priestly v. Fowler* and *Murray v. South Carolina R. Co.* These cases furnish the ultimate resort in a quest for the foundation and true conception of the doctrine of assumed risk. The opinion in the *Farwell* case was written by Mr. Chief Justice Shaw, who considered the foundations of legal liability as disclosed by analogy, and summed up his investigation as follows:

"In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. *Under these circumstances the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default.*"

The idea then imparted by the expression "assumption of risk" is that the injury to the servant was the result of pure accident. The fundamental idea of "accident" is that neither party was at fault. Accordingly the expression "assumption of risk" should not be used to mean that the master is relieved by liability that otherwise would exist. The expression is improperly used where it appears that the master was guilty of negligence.

It has been asserted in another connection that that which separates the status expressed by the term "assumption of risk" from the status connoted by the terms "negligence" and "contributory negligence" is the existing standard of care, the former expression meaning that the conduct of the parties was above the standard

³⁸ 4 Port. 239.

³⁹ 3 Mees. & W. 1.

⁴⁰ 1 McMull. L. 385, 36 Am. Dec. 268.

⁴¹ 4 Met. 49, 38 Am. Dec. 339.

and the latter terms that their conduct was below the standard.⁴² Bearing in mind that assumption of risk means injury from accident without negligence, we offer a few words in support of that assertion.

Assumption of risk certainly means that the master is not liable. He is not liable because he has not been guilty of any negligence, the injury being said to be attributable to one of the perils that inheres in the employment. The master may subject the servant to certain dangers without incurring responsibility for an injury which may result from the dangerous instrumentality. The limit of the amount of peril to which the master may subject the servant is that amount which exists in the same business as conducted by ordinarily prudent masters in the vicinity. Any danger to which the master subjects the servant over and beyond this limit (*i. e.*, the existing standard of care) imposes responsibility upon the master for a resulting injury. So we have conduct on the part of the master, which is actionable (negligence) and conduct which is not actionable (assumption of risk) according as the conduct is below or above the existing standard of care. A very good illustration may be taken from the use or nonuse of blocking for guardrails and frogs. In the State of I. public policy as expressed by judicial decision declares that railroads need not block the frogs and guardrails of their tracks, in the State of O. public policy acting through the judiciary or legislature has announced that blocking is necessary to the safety of employees. In other words, the standard of care which a railroad company must exercise is different in the two states. If then a switchman gets his foot caught in an unblocked frog in the State of O., the railroad company is guilty of negligence; but if the accident occurred in the State of I. the switchman assumed the risk. Furthermore, before the public policy of the State of O. declared itself to be in favor of blocking, the same condition obtained as now exists in the State of I., and what is now negligence was then conduct expressed by the term "assumption of risk." Therefore what separates the conduct of the parties as described by the expression "assumption of risk" from their conduct as expressed by the terms negligence and contributory negligence, is the existing standard of care, and this standard is the concept of court or legislature (public sentiment) at the particular time of the injury.

There is no practical difference in the result whether we say that a servant is not entitled to recover because he assumed the risk, or whether we say that he is debarred from recovery because of contributory negligence. If you say "contributory negligence," thereby contemplating the conduct of both master and servant as being below the standard of care, or say "assumption of risk," thereby considering neither as being at fault, the result is the

⁴² Law Notes, July, 1911.

same; you merely lower the standard of care when you change your phraseology from the former to the latter mode of stating the case. The idea is that the servant's conduct bears such a relation to the master's conduct that there can be no recovery. But there is no uniformity in the use of the terms by the courts or by the judges of the same court, and it is for this reason that there is so much confusion and disagreement as to the meaning of the terms. There is a very noticeable tendency to make the expression "assumption of risk" convey the idea that the master has been remiss but that the servant is barred from recovery because he knew of such remissness and took a chance of escaping injury. For example, in a quite recent Federal case the court said that since the servant knew and appreciated the danger incident to his work he assumed the risk as a matter of law even if the danger was caused by a negligent omission on the part of the defendant. It is submitted that this use of the expression is improper. The terms negligence and contributory negligence should be used to denote the relation between the conduct of the parties in such a case; otherwise we can not hope to clear up the existing misunderstanding. It has been shown above that the expression "assumption of risk" originally meant "accident." If it must be used at all it should be confined to this meaning. There is, however, no necessity for using the expression assumption of risk. It really has no place in the law, and has served only to confuse and confound counsel, judges and juries, and bring about a miscarriage of justice. The expression never should have been allowed to assume its present importance. The whole doctrine of assumption of risk is superfluous. It properly means only that the master has not been guilty of actionable negligence. Why not say so then in simple language instead of adopting technical terms that only cause confusion.

It appears from the above that the expression as used in the opinions means sometimes that the injury was due to no negligence on the part of the master, but to pure accident, and at other times that the servant was guilty of contributory negligence. Can it mean anything else? It is believed that any case wherein the doctrine of assumed risk is said to be presented may be altered in phraseology so as to eliminate that doctrine and rest the questions presented therein upon fulfillment or breach of duty. *There is no case wherein the doctrine of assumption of risk is said to apply which cannot be reduced to terms of negligence and contributory negligence.*

The fundamental idea of assumption of risk is knowledge on the part of the servant of the dangerous instrumentality which produced the injury. He knew of the danger and took a chance of escaping it. These conditions are equally present in cases determined under the principles of negligence and contributory negligence. In either case the action or non-action of the servant con-

sists in the language of Mr. Justice Holmes, in *Schlemmer v. Buffalo, Etc., R. Co.*:⁴³

"In conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen."

In the Century Digest the analysis of part of the title "Master and Servant" is as follows:

III. Master's Liability for Injuries to Servant.

(F) Risks Assumed by Servant.

5. Knowledge by Servant of Defect or Danger.

(a) In General.

Continuing Work with Knowledge of Danger, § 583.

The first paragraph under this section reads as follows:

"[a] (U. S. 1875.) One voluntarily continuing in a dangerous occupation, knowing that insufficient means are provided for avoiding the dangers, cannot recover for injuries resulting therefrom.—*Keilley v. Belcher Silver Min. Co.*, Fed. Cas. No. 7, 761 (3 Sawy. 500)."

Another paragraph in the same section is as follows:

"[e] (Ill. 1884.) By remaining in the service of his master after having learned the risks of his employment, a servant assumes such risks and cannot recover for injuries therefrom.—*Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383.

The analysis of another portion of the same title is as follows:

III. Master's Liability for Injuries to Servant.

(G) Contributory Negligence of Servant.

2. What Constitutes Contributory Negligence in General.

Continuing Work with Knowledge of Danger, 684.

The first paragraph in this section is in the following language:

"[a] (U. S. 1883.) If the plaintiff, a switchman, injured while riding on a locomotive, in the discharge of his duties, by the derailment of the locomotive, due to defects in the track, knew of the defective track, and continued to use it without complaint, he contributed to his injury, and cannot recover.—*Smith v. Memphis & L. R. R. Co.* (C. C.) 18 Fed. 304."

Another paragraph in section 684 is as follows:

"[e] (N. Y. 1876.) Where a servant is fully aware of the difficulties and hazards he is required or expected to encounter, and, without objection or protest, undertakes or continues in a hazardous occupation, subjecting himself voluntarily to danger that might be reasonably expected by him, from his knowledge of the facts and circumstances in the premises, he should not be exonerated from the consequences of his own rashness and negligence.—*Jones v. Roach*, 41 N. Y. Super. Ct. (9 Jones & S.) 248."

Another illustration may be taken from volume five of the Key Number Series (American Digest, 1908B). In section 217 of the title Master and Servant, under the subheading "Risks Assumed by Servant," appears the following paragraph:

"[111] (Ill. App. 1907.) Where a servant knowing the danger which confronts him in the doing of a particular act voluntarily exposes himself

⁴³ 205 U. S. 12, 27 S. Ct. 407, 51 U. S. (L. ed.) 681.

to such danger and does such act, he cannot recover.—*Lumaghi Coal Co. v. Grenard*, 133 Ill. App. 27."

In Section 234, under the subheading "Contributory Negligence of Servant," the following paragraph appears:

"[z] (W. Va. 1908.) Where an employee wilfully encounters danger known to him or open to be seen by him, he cannot recover for injuries caused thereby.—*Priddy v. Black Betsy Coal & Mining Co.*, 61 S. E. 163."

In the Decennial Digest we find this strong proof of the theory expressed above. The analysis of part of the title Master and Servant is as follows:

III. Master's Liability for Injuries to Servant.

(F) Risks Assumed by Servant.

§213. Dangerous Operations and Methods of Work.

§213 (2). Use of Machinery.

And turning to the section mentioned above we find the following paragraph:

"[c] (Ill. App. 1902.) Where the servant fails to use a stick furnished him for the purpose of safely cleaning the rollers of a corn shredder, but chooses the more dangerous method of using his hand for that purpose, he assumes all the risk incident to the increased danger which he thereby incurs.—*Frink v. Potts*, 105 Ill. App. 92."

Turning over a page of the analysis we find the lines to be as follows:

III. Master's Liability for Injuries To Servant.

(G) Contributory Negligence of Servant.

§237. Dangerous Operations and Methods of Work.

§239. Use of Machinery or Appliances.

By referring to section 239 we find the following digest paragraph:

"[u] (Mo. 1903.) Where a servant in oiling machinery, accidentally dropped a funnel in a crank pit, and inserted his hand in the pit to remove it, knowing that the whole operation must be performed within the space of three seconds in order to avoid injury, and that the funnel might be easily and safely withdrawn by means of a twisted wire, he was negligent.—*Doer v. St. Louis Brewing Ass'n*, 176 Mo. 547, 75 S. W. 600."

The Decennial Digest, section 205, under the subdivision "Assumption of Risk," contains paragraphs embodying the same propositions as the paragraphs in section 231 under "Contributory Negligence." The same is true of sections 218 and 230; and probably everything of substance under "Assumption of Risk" may be placed under other headings leaving only a lot of meaningless phrases. (We disclaim any intention of criticising adversely the works referred to above. We have found them the most useful tools available to an investigator.)

In conclusion, we cite the case of *Barker v. Lawrence Mfg. Co.* At the trial of this case there was evidence on the part of the

plaintiff tending to show that on a certain day he was at work about eight o'clock in the morning upon a machine called a soaping machine, leaning forward, and reaching for a bolt used in opening the machine; that the floor on which he stood was wet and slippery; that his foot slipped and he fell into an opening about twenty feet long and several feet wide caused by the taking up of the floor; that he was not informed by any one that the floor was to be taken up, or that it was taken up at the place where he fell; that he did not know that it was taken up at that place; and that the light was such at the place where he was at work, and the steam was so dense, caused by drawing off under the floor the hot water from the soaping machine, that he could not see that the floor was up. There was no fence or guardrail at the opening. The jury returned a verdict for the defendant. The plaintiff's counsel quibbled as to the mode in which the jury were charged with respect to assumption of risk. The court said:

"The substance of the instruction given as to the assumption of the risk was that if the plaintiff knew that the hole was there, or would have known of the opening in the exercise of proper care with reference to what was going on there so far as he knew it, he could not recover; and that if he did not know of the opening, and would not have known of it in the exercise of proper care, the jury must inquire whether the injury was due solely to some neglect of duty on the defendant's part. *Whether the case properly is to be described in terms of the plaintiff's negligence, or of assumption of the risk, the plaintiff was not injured by the instructions.*"

The conclusion is irresistible that the defenses of assumption of risk and contributory negligence are not distinct and different as has been asserted in half a hundred opinions, and that they cannot rest upon different grounds as is commonly supposed.⁴⁵ It is submitted that the term "assumption of risk" is a euphemism. The courts having a tender regard for litigants substitute it for the plain and ugly terms "negligence" and "contributory negligence." Instead of saying that the master was negligent, it is said that the servant did not assume the risk; and in place of saying that the master was not negligent or that the master was negligent and the servant was guilty of contributory negligence, the court solemnly declares that the servant assumed the risk.⁴⁶

PLACES OF AMUSEMENT AND SAFETY OF PATRONS.—The *Bench and Bar*⁴⁷ contains an interesting review of the recent New York cases upon the duty of proprietors of places of amusement to provide for the safety of their patrons. In the latest one,⁴⁸ an agricultural fair association had among its attractions a balloon ascension and the plaintiff, a spectator while watching the ascen-

⁴⁵ See note 18 Am. & Eng. Ann. Cas. 960 *et seq.*

⁴⁶ *Berkeley Davids*, New York City.

⁴⁷ Vol. 23, p. 10.

⁴⁸ *Roper v. Ulster Co., Agr. Soc.*

136, App. Div. 97.

sion, had her foot caught in a long rope hanging from the balloon. The society was held liable.

Two earlier cases are cited, one⁴⁹ where the plaintiff was also watching a balloon ascension and was hurt by the falling of a pole used to hold the balloon in place while it was being inflated, and the defendant was held liable. This differed from the later case in this that here the defendant was giving the exhibition while in the other the agricultural society had engaged the aeronaut to give the ascension and he furnished the apparatus and superintended the affair. In the second case cited,⁵⁰ of an independent contractor, the floor of a platform on the Iron Pier at Rockaway Beach, used as a public restaurant, gave way and injured the plaintiff. The defendant was the lessee of the pier and the platform had been constructed by his lessors. But the defendant was held liable on the theory that, "where a party in possession of premises throws the same open to the public for purposes of gain, he impliedly warrants the premises to be reasonably safe for the purposes for which they were designed," and that defendant "failed to show a condition of facts establishing a reasonable degree of care to make the premises what he held them out to be," support the rule that it is the duty of the proprietor of a place of amusement, to which the public are invited, to use reasonable care in providing for the safety of spectators. Where the liability is based upon the failure to use such care, the question whether the performance was given by an independent contractor or not is immaterial.

On the other hand, where the proprietor has used reasonable care in providing for the safety of his patrons he cannot be held responsible for the negligence of the independent contractor giving the exhibition or performance nor for the negligence of the latter's servants. This is well illustrated by *Deyo v. Kingston Consolidated R. Co.*,⁵¹ where plaintiff was injured by a rocket stick which fell upon her while she was a spectator at an exhibition of fireworks given at an amusement park maintained by defendant. The exhibition was given by a corporation in the independent business of manufacturing and exhibiting fireworks, under a contract with defendant, whereby the former had full control of the exhibition through its own employees. The plaintiff's injury resulted from the act of an employee of the fireworks company, and defendant was held not liable. Where, on the other hand, a citizens' committee took charge of the exhibition, the fact that the fireworks company furnished and paid a man to do the work and a boy to assist him in handling the large pieces, did not render the fireworks company liable, especially as the rocket which injured plaintiff was fired by the boy under the direction of the

⁴⁹ *Peckett v. Berger Beach Co.*, 44 App. Div. 559.

⁵⁰ *Schnietzer v. Phillips*, 108 App. Div. 17.

⁵¹ 94 App. Div. 578.

chairman of the committee.⁵² In *Sebeck v. Plattdeutsche Volkfest Verein*,⁵³ the proprietor of a place of amusement was held by the New Jersey Court of Errors and Appeals not liable for injuries resulting from the explosion of a mortar containing a bomb, during an exhibition of fireworks given by an independent contractor, the defendant having taken due precaution to prevent spectators from going within about one hundred feet of the stand from which the fireworks were set off. The duty of the proprietor of such a place is well set forth in the opinion of Justice Gummere as follows:

"We cannot yield to the view that the defendants were entirely relieved from responsibility for the safety of the persons in attendance upon its festival, because this exhibition was given by an independent contractor. Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendants' invitation, the duty was cast upon the latter of taking due precautions to guard against injury."

INSPECTION OF BURIED HUMAN BODY.—The Supreme Court of New York has had before it the difficult question as to whether a court has an inherent power to order the disinterment, inspection and dissection of a buried human body for the purpose of furnishing information or evidence bearing upon or for use in the trial of a civil action. The action was by the administratrix of a decedent to recover damages for his death alleged to have been caused by injuries received in a collision with an automobile owned by the defendant. It was contended that disinterment and dissection of the remains would enable defendant to show that the death could not have been caused by the accident, but was due to an independent disease. The court, after stating that this was the first application of the kind, so far as is known, that had ever been made to the courts of New York, refused the request,⁵⁴ saying:

"In a case where, by the terms of an insurance policy, the insurance company was to be allowed the right to 'examine the . . . body of the assured,' it was held the right must be asserted before burial, and the company had no right to demand an autopsy after the insured had been buried. These cases illustrate the reluctance with which courts permit any interference with human remains when once interred. They all point to the conclusion that, to justify such action, the authority therefor must be clear and explicit. We fail to find such authority in the provisions of section 803 of the Code of Civil Procedure."

In a case in the Federal Court of Kansas it was held, on the other hand, that in an action in equity to cancel a policy of life

⁵²*Wyllie v. Palmer*, 137 N. Y. 248.

⁵³ 64 N. J. L. 624; 124 Fed. Rep.

11; See also *Thomas v. Springl*, 134 App., Div. 640.

⁵⁴ *Danahy v. Kellogg*, 70 Misc. 310.

insurance, to which the widow of the insured was a party, she being treated as the one who legally had control of the body of her deceased husband, an order would be made that the marshal of the district exhume the body for examination by a pathologist and a chemist to be appointed by the court in order to determine whether death was occasioned by morphine poison.⁵⁶ The court said that if "such disclosure cannot be made it is because of the right of one party to disclose the truth if believed advantageous and to conceal it if believed harmful, and that ought not to be a rule for the guidance of courts. And the only objection aside from that as to the power of the court is one of sentiment, as if sentiment should control in the administration of justice. . . . Can any one doubt that all sentiment would dissipate and all objection would vanish if it were necessary for the estate to make the showing in order to recover the large sum of money involved? And why should it be optional with one party to say what part of the truth shall be made known and what part kept from the court?"

Commenting upon the question the *New York Law Journal*, in a valuable note, says:

"The discussion in the Kansas case is very voluminous, and there were cited cases on both sides of the controversy whether a court has inherent power to compel the physical examination of a living person who is a party to a civil action. Although the authority of the Supreme Court of the United States⁵⁷ is against such inherent power, the judge evidently favored the contrary view, and would not extend the doctrine of the Botsford case so as to inhibit the examination of the remains of a dead person. The two classes of cases are, of course, distinguishable, but it is not improbable that the sentiment against offering indignity to a corpse is fully as strong as that of the inviolability of the person of the living, and in the long run would prove fully as effectual in inducing courts not to assert inherent power or not liberally to construe statutes so as to authorize compulsory autopsies. A bill has been introduced in the present Legislature granting to parties the right of inspection before trial of the site or locality of an occurrence constituting the alleged cause of action. It would be within the power of the Legislature to extend the remedy of discovery and inspection so as to include the privilege of disinterment and autopsy in proper cases. It is believed, however, in view of the position the New York courts have taken against the inherent right to grant a physical examination of a living person⁵⁸ and the general sentiment shown by existing legislation for preserving inviolate the graves of the dead, that an application for discovery and autopsy will not be granted unless in pursuance of express statutory authority. It is doubtful also whether in the present state of sentiment a statute could be adopted in this state for allowing a remedy which would be of undoubted utility and importance in civil cases and which has long been recognized as necessary for the administration of justice in criminal cases."⁵⁹

⁵⁶ Mut. Life Ins. Co. v. Greesa, 156 Fed. 398.

⁵⁷ Union Pacific R. Co. v. Botsford, 141 U. S. 250.

⁵⁸ McQuigan v. R. Co., 129 N. Y. 50.

⁵⁹ April 20, 1911.

NOTES OF RECENT DECISIONS.

ANIMALS—DOGS—RUNNING AT LARGE—INJURY.—That a dog was unlawfully permitted to run at large unmuzzled does not make the owner liable for injury caused by the dog unless lack of the muzzle proximately caused the injury, and hence an owner is not liable for injury caused by an unmuzzled dog running against a pedestrian in playing with another dog.¹

ANIMALS—RUNAWAY HORSE.—Subject to statutory provision an owner of stock is liable for their trespass, regardless of negligence; but an owner of horses driven along a highway with due care is not liable for injury caused by their taking fright and dashing against an abutting building, destroying a window therein.²

ATTORNEY AND CLIENT—SUSPENSION AND DISBARMENT.—For an attorney to publish and advertise a pamphlet, the purpose of which is to attract non-residents to the state to apply to its courts for divorce, through his agency as an attorney, that he may profit financially thereby, is "misconduct," within Comp. Laws, Sec. 2625, providing for removal or suspension of attorneys for misconduct.³

BANKRUPTCY—SALE—DISABILITY TO PURCHASE.—Neither an appraiser of a bankrupt nor his attorney for his benefit may purchase the bankrupt's assets at a public sale thereof. By public policy he is as a matter of law incapable of purchasing, and also under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565), Sec. 70b, 1 Fed. Stat. Ann. 702, providing that all real and personal property belonging to bankrupt's estates shall be appraised by three "disinterested" appraisers to be appointed by and to report to the court.⁴

CARRIERS OF PASSENGERS—WHO IS PASSENGER.—A. entered the waiting room at a station on defendant's railroad, having the return part of a round-trip ticket, and, after inquiring the time of his train, sat down and waited for it. There were two tracks in front of the station building and his train passed on the farther one. A street crossed the tracks at the end of the station, paved with concrete, and from it and on the same level a paved platform extended on the outer side of each track, there being no division between the pavement of the street and the platforms. A picket fence also extended from the street between the tracks past the station, which prevented crossing except on the street. An automatic bell was rung by every train from the time it approached until it left the station. The train of A. stopped with the rear car on the street crossing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. *Held*, that A. was a passenger, and did not lose that relation by entering upon the street to reach his train which was at the implied invitation of defendant.⁵

CARRIERS OF PASSENGERS—RULE REQUIRING PASSENGER TO DEPOSIT FARE IN BOX.—A rule of a street railway company requiring payment of fare

¹ Forsythe v. Kluckhorn, 129 N. W. 739, Ia.

² Metropolitan Casualty Co. v. Clark, 129 N. W. 165, Wis.

³ Re Schnitzer, 112 Pac. 848, Nev.

⁴ Re Frazer, 181 Fed. 307.

⁵ Atlantic R. Co. v. Clegg, 183 F. 216.

by its passengers by means of an automatic fare-registering device held in the hand of the conductor, consisting of a small nickel-plated box having a coin-slot on one side, through which the passenger inserts the nickel, the coin being drawn into the device by its mechanism as soon as the edge of the nickel touches certain levers within the slot, whereupon the fare is registered automatically, under which rule a passenger may either insert a coin possessed by him or may receive one in change from the conductor and insert it, is not unreasonable as causing great inconvenience and annoyance to passengers without benefit to the traveling public, as being solely for the benefit of the carrier, in keeping a check upon dishonest conductors, as being a reflection upon the honesty of the conductors, and as not serving the convenience of the conductors in keeping account of the fares collected; the rule imposing no greater burden upon the passengers than a permissible rule requiring the purchase of tickets and being of aid to the carrier and its conductors in simplifying the accounting for fares, obviating the necessity of daily settlements between them, securing accuracy, and tending to prevent fraud and mistake.⁶

CARRIERS OF PASSENGERS—TRESPASSERS—FRAUD.—Plaintiff proposing to make a trip over defendant's railroad, a pass for a part of the distance was obtained for her by an acquaintance who falsely represented that she was his sister. Plaintiff, with knowledge of the fraud, used the pass, changing her name to carry out the misrepresentation, and while riding on the return coupon of the pass was injured in a collision due to a misplaced switch. *Held*, that plaintiff was a trespasser, as to whom the carrier was only bound to refrain from a willful or wanton injury.⁷

COMMON LAW—NATURE.—The term "common law" does not have a fixed meaning, the law varying in different centuries and states; but, viewed objectively and at large as a system of deducing from litigated instances just, reasonable, and consistent rules, the common law never changes.⁸

CONSPIRACY—RESTRAINT OF TRADE—CONTINUING CRIME.—A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business in violation of the Sherman Act of July 2, 1890, was not a completed crime as soon as formed, but continued up to the time of abandonment or success, and therefore that the statute of limitations did not begin to run until such abandonment or success.⁹

CONSTITUTIONAL LAW—PROSTITUTE—DISCRIMINATION—POLICE POWER.—Law 1910, c. 659, sec. 79, providing for medical examination of prostitutes, is not unconstitutional in discriminating between men and women; it being an enactment having for its aim the safeguarding of the health of the inhabitants of the state, and being within the police power.¹⁰

CONSTITUTIONAL LAW—EQUAL PROTECTION—POLICE REGULATIONS.—An —A statute providing that the officers and men of the Kansas National Guard shall, when in the performance of military duty, be transported on all railroads of the state at the rate of one cent per mile, denies to the railroad companies the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States.¹¹

CONSTITUTIONAL LAW—UNIFORMITY OF LAWS—CLASS LEGISLATION.—The fact that a prohibition of the use of soft coal in locomotives does not

⁶ *Martin v. R. Co.*, 78 A. 548, R. I.

⁷ *Denny v. R. Co.*, 139 N. W. 363, Ia.

⁸ *Metropolitan Ins. Co. v. Clark*, 129 N. W. 1065, Wis.

⁹ *U. S. v. Kisel*, 31 S. C. Rep. 125, U. S.

¹⁰ *People v. Fox*, 127 N. Y. Supp. 484.

¹¹ *Ex parte Gardiner*, 113 Pac. 1054 Kas.

apply to stationary engines does not make such prohibition partial legislation; there being obvious differences between the two classes of engines in respect to the tendency that burning soft coal has to cause a smoke nuisance, and other appropriate legislation having been enacted by the city to prevent the emission of dense smoke by stationary plants.¹²

CONSTITUTIONAL LAW—EQUAL PROTECTION—POLICE REGULATIONS.—An ordinance prescribing a penalty for using a furnace for melting metals or glass, or for using a stationary steam engine, in which fuel other than anthracite coal is used, without a permit from the city council, fixing the location, height of stacks, etc., is invalid, as violating Const. U. S. Amend. 14, in that it vests in the city council arbitrary power and unreasonable power; no conditions upon which the permit may be granted or rules securing impartial exercise of the power being prescribed.¹³

CONTRACTS—MUTUAL PROMISES—INDEPENDENT OR CONDITIONAL.—The Standard Rubber Company was indebted to the plaintiff, and entered into an agreement whereby the Standard Rubber Company was to give a bond with sufficient security to cover the debts that were due or to become due and the plaintiff was to extend a certain line of credit. Between the execution of the bond and the commencement of suit the Standard Rubber Company was declared insolvent and defendant was appointed receiver. Plaintiff refused to extend any further credit after the bond was given. Plaintiff now sues upon the bond and the defense is failure of the consideration for which the bond was given. *Held*, where there are mutual promises, and the time for performance by one party may arrive before the time for performance by the other, the later promise is an independent obligation, and not a condition precedent of the former, and its non-performance does not bar an action upon the former promise.¹⁴

CONTRACTS—MUTUALITY—PAYMENT OF REBATE.—An offer by a seller to pay the buyer a certain per cent rebate if the latter would purchase its entire supply from the seller does not, on acceptance by the buyer, become a contract, since it lacks mutuality, not being enforceable against the buyer.¹⁵

CONTRACTS—CONSIDERATION—GRATUITOUS PROMISE.—Plaintiff, a mail carrier, whose term was about to end, applied to the government for another term. The rules of the department required that advertisement should be made for sealed bids, mailed to the post office, accompanied by a bond; such contracts being usually let to the lowest bidder. Plaintiff handed the blank bond to the defendant, who was a notary public, and requested him to fill it out, which he did, plaintiff telling defendant that he did not want any one to know the amount of his bid. A few days after plaintiff's bid had been filed with the government, he learned that the defendant had underbid him, and the contract was awarded the defendant. *Held*, that plaintiff was not entitled to damages, as the promise, not to divulge the bid, if there was one, was a mere gratuity.¹⁶

CONTRACTS—ILLEGALITY—NEW AGREEMENT.—Plaintiff, a bookmaker, sued defendant, who was also a bookmaker, to recover the amount of debts lost to him by the latter. Defendant pleaded illegality, and plaintiff thereupon alleged a fresh agreement between the parties by which defendant agreed to pay the amount due in consideration of plaintiff allowing defendant time to pay and refraining from publishing the fact that he had been a defaulter.

¹² State v. R. Co., 130 N. W. 545, Minn.

¹³ Richmond v. Model Laundry, 69 S. E. 932, Va.

¹⁴ United Rubber Cos. v. Conard, 78 Atl. 203, N. J.

¹⁵ Bessire v. Corn Products Co., 94 N. E. 353, Ind.

¹⁶ Harrison v. Reel, 70 S. E. 463, N. C.

Evidence was given by plaintiff that upon the Saturday when the bets should have been paid defendant came to him and asked for time and also that the matter should be kept secret. On the following Monday defendant came to see him again and paid him 10s on account and asked him to keep the matter absolutely confidential, saying that it would do him a lot of harm if it got about. Plaintiff promised to keep the matter confidential, and in his evidence said that if it had got about it would finish defendant as a bookmaker. *Held*, that a new contract had been established under which the defendant agreed to pay the sum due at a future date, and that there was consideration for this promise.¹⁷

COURTS—FEDERAL COURT—ORIGINAL JURISDICTION—SUIT BY STATE—ENFORCEMENT OF CRIMINAL OR PENAL LAWS.—1. The Federal Supreme Court cannot take original jurisdiction of a suit by a state against persons or corporations of other states, where such suit, though in the form of a civil action, is, in its essential character, one to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors. 2. A state may not invoke the original jurisdiction of the Federal Supreme Court by suit on its behalf against persons or corporations of other states, where the primary purpose of the suit is to protect its citizens generally against the violation of its laws by the corporations or persons sued.¹⁸

DAMAGES—PENALTIES AND LIQUIDATED DAMAGES.—A contract for tearing down and removing buildings provided that the work should be done within thirteen days, and that, if the contractor should complete the work in less time, he would be paid \$50 for each day saved, and that, if the work was not done within the thirteen days, he should pay \$50 for each day over. The contractor, with a large force, completed the work in two days. *Held*, that the stipulated payments were not in the nature of a penalty.¹⁹

DAMAGES—CONSEQUENTIAL DAMAGES—LOSS OF OPPORTUNITY TO COMPETE FOR EMPLOYMENT.—The defendant contracted to choose, from fifty women who should be selected by the readers of a newspaper, twelve to be members of his theatrical company. He failed to give notice to the plaintiff, who was one of the fifty, so that she might present herself for the final selection. *Held*, that the plaintiff's recovery is not limited to nominal damages.²⁰

DEFAMATION—LIABILITY OF EMPLOYER FOR SLANDER UTTERED BY SERVANT.—A tax collector in the employment of a corporation applied to a married woman for the balance of police tax due from her husband. She produced a receipt for an installment of the tax which showed that the amount still due was less than that claimed by the collector. He accused her of having tampered with the receipt with intent to defraud his employers, and repeated the statement on subsequent occasions. She brought an action for slander against the corporation. *Held*, that, in making the statement complained of, the collector was not acting within the scope of his employment, and that the action would not lie.²¹

DEFAMATION—PRIVILEGE.—Where a person to whom an inquiry is addressed regarding another communicates bona fide without malice, to the person making the inquiry, facts regarding the person inquired about, it is a privileged communication; and therefore a person is justified in giving his opinion in good faith of the integrity and standing of a tradesman in answer to an inquiry regarding him.²²

¹⁷ *Wilson v. Connolly*, 103 L. T. 461, Eng.

¹⁸ *Oklahoma v. Gulf & R. Co.*, 31 S. C. Rep. 437, U. S. Sup. Ct.

¹⁹ *House Wrecking Co. v. Sonken*, 133 S. W. 355, Mo.

²⁰ *Chaplin v. Hicks*, 27 T. L. Rep. 244, Eng.

²¹ *Glasgow v. Riddell*, 104 L. T. 354, Eng.

²² *Melcher v. Beeler*, 110 Pac. 181, Kas.

DIVORCE—CONNIVANCE—AGENCY.—A divorce will not be granted for adultery the commission of which by the defendant was brought about by the petitioner's own agent, even though by bringing it about the agent was acting beyond the strict scope of his authority.²³

EASEMENTS—PRIVATE WAYS—OBSTRUCTION—DAMAGES.—One wrongfully deprived of the use of farm land by wrongful obstruction of a way used in reaching it is entitled to reasonable compensation for damages naturally resulting, such as loss of the use of the land and of crops and pasturage, not being limited to the difference between the rental value of the land with the way open and with it closed, since he used the land himself.²⁴

ELECTIONS—BRIBERY.—Setting aside under the statute regarding contests of elections, providing that, if it shall appear from an inspection of the whole record that there has been such fraud or bribery in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, it may be adjudged that there was no election, such a judgment is proper, where it is apparent that there was wholesale bribery by both parties to the limits of their means, the successful party having the larger fund, so that it is impossible to say who was legally elected.²⁵

EVIDENCE—CONFESSION OF AN ALLEGED ACCOMPLICE.—In a prosecution for homicide, a confession made by an alleged accomplice, charging defendant with complicity in the crime, was admitted in evidence against the defendant, it being shown that before the information was filed against the accused but while he was in jail this confession was read to him in the presence of the author of it, and that the accused made no reply thereto. *Held*, that the confession might properly be read to the jury to support an inference of an assent by the accused to the statements of his complicity in the crime contained therein, based upon his silence when it was read in his presence.²⁶

EVIDENCE—PEDIGREE.—On the issue whether a certain child was born dead or alive, testimony of a neighbor, in a thinly scattered neighborhood, that it was generally understood that the child was born dead was admissible to corroborate the testimony of the mother and her daughter, the testimony of the latter witnesses having been somewhat impeached.²⁷

EXTRADITION—INTERSTATE.—The Governor, on the hearing of a requisition of the Governor of a sister state for the surrender of a fugitive from justice, need not try the question of the guilt of the fugitive, nor hear evidence, except so far as necessary to determine whether he is a fugitive from justice, and the identity of the fugitive may be inquired into, and whether the venue of the crime charged is properly laid within the demanding states may also be inquired into; but where the substance of the act charged in the indictment was committed by the alleged fugitive while in the demanding state, and the indictment on its face fairly charges the violation of the statutes of such state, the Governor may find that the alleged fugitive from justice is such, and issue a warrant of extradition.²⁸

FALSE IMPRISONMENT—ACTS CONSTITUTING.—Where a person went inside the inclosure of a ball ground to purchase a ticket for a game, and, finding there were none left, attempted to leave, but the crowd, which was very

²³ *James v. James*, 38 Wash. L. R. 789, D. C.

²⁴ *Weller v. Hembruch*, 129 N. W. 1067, Wis.

²⁵ *Ford v. Hopkins*, 132 S. W. 542, Ky.

²⁶ *Commonwealth v. Ballou*, 78 Atl. 831, Pa.

²⁷ *Weiss v. Ham*, 135 S. W. 384, Tex.

²⁸ *Harris v. Magee*, 129 N. W. 742, Ia.

large, pushed in through the usual exits, and special policemen of the ball company prevented the plaintiff from going out through such exits, and detained him there for some hours, a temporary interference with the plaintiff's legal right of egress could be justified as a proper police measure to suppress disorder and danger; but defendant owed the plaintiff the active duty to point out other means of egress, and was guilty of falsely imprisoning him in failing to do so.²⁹

FOODS—ARTIFICIAL COLORING.—A statute requiring all vinegar sold to be without artificial coloring or flavoring and prohibits the sale of any vinegar labeled as cider or apple vinegar which is not the product of pure apple juice, and section 4844, provides that no vinegar shall be branded "fruit vinegar" unless it be made wholly from fruit. *Held*, that the enactment of the statute was authorized in the exercise of the police power of the legislature for the purpose of preventing fraud and that the fact that the coloring was harmless and that the vinegar was labeled as colored upon the bottle did not make the statute invalid as going beyond the state's police power.³⁰

FORGERY.—RECOMMENDATION OF OFFICIAL.—An indictment for forging the name of the state's chief health officer to a letter recommending a disinfectant preparation, with intent to defraud, will not be quashed on the alleged ground that it does not show that the alleged forgery was to the prejudice of the rights of anybody as it may be particularly prejudicial to his rights.³¹

HOMICIDE—MUTUAL SELF-DEFENSE—RELATIONSHIP.—The affinity dependent upon the relationship of brother-in-law does not confer the legal right of mutual self-defense. "Relationship," in the law of homicide, justifying the taking of life to prevent the commission of a felony, is not restricted to the ties of affinity or consanguinity, but has the broader sense, denominating any tie, even if it be ephemeral, which binds the parties together.³²

HUSBAND AND WIFE—CURTESY.—A statute providing that real estate belonging to any woman at her marriage, or which may come to her during coverture, shall remain her separate property, and under her sole control, authorizes a married woman to convey or encumber her separate real property without her husband joining therein, a husband is not barred of his right of curtesy by a conveyance by his wife alone, and a lease executed by a wife of her separate property, in which the husband does not join, does not affect his right of curtesy.³³

INFANCY—MAY PARENT AUTHORIZE AGENT TO "KIDNAP" CHILD?—B. was indicted for kidnaping under a statute which makes it a crime to entice a child under 12 from the person having lawful charge thereof. In defense he set up that he was the child's stepfather, and took the child by authority of her mother. The mother had left her former husband, taking the child with her, and had obtained a divorce in the West Indies, and married defendant. She had been forced by poverty to return the child to the father's custody, but had exacted his promise to give her back when the mother should be able to provide proper support. *Held*, even if the mother had the right to entice away the child (which the court did not decide) she could not delegate such right, and authority to act as her agent was no defense.³⁴

²⁹ *Talcott v. Nat. Exh'ib. Co.*, 128 N. Y. Supp. 1059.

³⁰ *State v. Earl*, 133 S. W. 402, Mo.

³¹ *Com. v. Moore*, 28 Lan. L. R. 389.

³² *Gillis v. State*, 70 S. E. 53, Ga.

³³ *Enis v. Eager*, 133 S. W. 850, Mo.

³⁴ *State v. Brandenburg*, 134 S. W. 529, Mo.

INTOXICATING LIQUORS—KEEPING LIQUORS AT “PUBLIC PLACE OF BUSINESS.”
 —The private operating room of a practicing dentist, *prima facie*, is not a “public place of business,” within the terms of the general prohibition law of 1907.²⁶

MASTER AND SERVANT—INTERFERENCE WITH EMPLOYMENT—ADVERTISING STRIKE.—Driving through the streets a wagon bearing placards announcing a strike, without picketing, the blocking of streets, or actual interference with the employer, or with the men employed in place of the strikers, is not wrongful, in view of St. 1910, c. 445, imposing on an employer, while a strike lasts, the duty to inform persons, whom he solicits to take the place of the strikers, of the existence of the strike.²⁷

MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY—BREACH—RESCISSION.—1. The continuing character of a waterworks company's contract obligation to furnish an adequate supply of wholesome water is not met by showing that such a supply has been furnished at times, or that, at the time of completion of the works, the company was able to carry out its contract, nor is non-performance excused by the occurrence of conditions which are likely to happen in a climate of long, dry summers. 2. A municipality has the right to treat a contract with a waterworks company as terminated by the latter's breach of its contract obligation to furnish a continuous adequate supply of wholesome water, and to invoke the aid of a court of equity to enforce its rescission, since the remedy at law by an action for damage is wholly inadequate.²⁸

MUNICIPAL CORPORATIONS—FLUSHING OF STREETS—NOT LIABLE FOR NEGLIGENCE OF AGENTS.—A, while walking along the streets of Louisville, was suddenly drenched by the bursting of a hose which was being used by city employees engaged in flushing the streets. A severe cold contracted thereby impaired her health, whereupon she sued the city for damages. *Held*, that the city is not liable, since the flushing of the streets was a public duty undertaken by the city in the exercise of its governmental functions for the promotion of the health, safety, and comfort of its inhabitants and the public generally, without profit.²⁹

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCIES.—Where a person, under a state of fright induced by the negligent act of another person, does an act which produces injury, the question whether the conduct of the person so frightened is to be regarded merely as a medium through which the negligence causing the fright operated (so as to make the negligence the legal cause of the injury), or as itself (*i. e.*, the conduct of the frightened person) the legal cause, is to be determined in accordance with whether the situation produced by the prior negligent act was such as would naturally tend to produce that degree of fright which the particular person experienced, and whether a normally prudent person so frightened would have been likely to have done some such act as the frightened person did.³⁰

²⁶ *Cantrell v. State*, 70 S. E. 96, Ga.

²⁷ *Steinert v. Tagen*, 93 N. E. 584, Mass.

²⁸ *Columbus v. Mer. Trust Co.*, 31 S. C. 106, U. S. Sup. Ct.

²⁹ *Kipper v. Louisville*, 131 S. W. 131, Ky.

³⁰ *Atlantic Coast Line v. Daniels*, 70 S. E. 203, Ga.

THE DOCKET.

THE TRIAL FOR MURDER IN ENGLAND described in this number of the REVIEW took place while the DOCKET was in London last summer studying the administration of criminal law in the country from which ours came, and he was present at the hearing and decision before the Court of Criminal Appeal, which will be described in the next issue. In that number of the REVIEW, which will contain the end of this interesting criminal case, the DOCKET intends to make a contrast between this trial for murder at an English assize town with a similar trial in one of our own cities.

LORD COLERIDGE, who presided at the trial of Dickman, and whose portrait appears in this number, is one of the justices of the English King's Bench. He was born in 1851, became a Queen's Counsel in 1892, and was a Bencher of the Middle Temple, and a member of both the House of Commons and the House of Lords before being appointed a High Court Judge in 1907. His grandfather and father had both been judges of the same court, but the present Lord Coleridge fully sustains the high reputation of the two preceding generations of his family. His grandfather was Sir John Taylor Coleridge, who was a justice of the Court of King's Bench from 1836 to 1858, and his father was Lord Chief Justice of England from 1880 to his death in 1894.

THE visit of Lord Chief Justice Coleridge to the United States is still remembered by the American bar. But for many years before this he had had numerous friends and correspondents in this country, among them Horace Binney of Philadelphia, and Richard H. Dana of Boston. In one of his early letters to Mr. Binney, written in 1856, when the future chief justice was a struggling barrister, he tells him of a providential escape from a severe and, perhaps, fatal illness. "It seems presumptuous," he says, "to speak of Providences, but I had an instance of God's mercy which I never can forget. I came home from abroad out of order, and was obliged to go off upon special business for a couple of days, being tempted by a fee beyond the common to break my vacation. And when I came home I found a request from Freshfields, our great London house, to go to Paris to examine witnesses under a commission on behalf of the Bank of England. Though

I didn't feel well, yet the large fee and the desire to see Paris, where I have never been, tempted me to say yes, and I was just starting, when I received a countermand by telegraph to say that the bank had settled the action. I was rather disgusted at the loss of my trip to Paris at the expense of the bank, and of the fee also; and in two days afterwards I was in bed, in a very bad fever, with congestion of the brain and lungs. If I had gone to Paris, humanly speaking, I must have died, for I should have struggled on with my work till it was too late, and should have had no one near me to look after me, a thing essential in a bad fever."

Most of his letters to his Philadelphia friends touch upon the coming struggle between the North and the South, and his anxious thought is that his own country and theirs shall not be drawn into a hostile encounter. "I hope," he says, "this present squabble in the far West will not alienate England and America. It would be a miserable business to go to war for such a matter. Your men seem to have been precipitate and aggressive. I only trust neither side has by this time gone too far to recede with dignity and leave the matter either to negotiation or arbitration. I remember being much struck by what you said at my father's house in Park Crescent as to the help that America would give us if there arose real danger of our independence being lost. I believe really that Jonathan would not like to see John killed, though, maybe, he wouldn't mind seeing him worried a bit; but, if Jonathan actually goes into the ring with John, I don't know what he would say if John was the same moment assailed in the rear. However, I do pray that the wise and religious men of both nations will do their utmost to avert such a world-wide calamity as the two free nations of mankind endeavouring to injure and ruin one another to the certain ultimate injury of both. I won't believe such a thing till it actually takes place."

WHEN the irrepressible conflict ended in war and the armies of the North and South were confronting each other on the field, the chief justice, like many other eminent Englishmen of the day, was disposed to give his sympathy to the Confederacy. For the descendants of the men who signed the declaration of independence to call the men who had seceded "rebels" was, he thought, rather amusing. "You," he says, "broke off, in my opinion, quite rightly from a monarchy of 800 years, because it was being administered in a sense oppressive to you. Well the South breaks off from a constitution eighty years old, and language is used to them that would have been extreme in the mouth of Lord North or his cabinet. It is nothing to prove, as Mr.

Everett has done, quite conclusively, that the constitution did not provide for its own dissolution—of course, it did not. But, surely, in common sense, so large a body as the South has the right to set up for itself, if, in a long course of years, it found or thought it found, the whole federation formed in a sense commercially hostile to them, and for the benefit of the other great division of the country—in particular for the benefit of Pennsylvania. If we persisted in making every Irishman pay more for every knife and nail and every set of cotton or linen he used, to benefit Liverpool and Manchester and Sheffield. I, for one, should say that Ireland would be perfectly justified in setting up for herself, if she was really strong enough to stand alone. And sure I am that no very warm sympathy would be felt for England in an attempt to coerce her to submission. It is very well for you and Binney to assure me that we who think the selfishness of the North had something to do with the secession of the South are quite wrong, but the facts remain, and I suppose human nature is the same with you as with us, and it is not in human nature to like to be the victim of protectionist tariffs. We don't like it here, and I suppose the South don't like it there." Even as late as March, 1864, he says, in a letter to Mr. Binney. "The Southern treachery, in which the war began, and the hateful and barbaric ends (as I think them) for which the South are struggling, utterly prevents my wishing success to them, however much such men as Longstreet and Lee and Jackson command my sympathies, in spite of their cause. My difficulty remains what it always has been, to see on what principle a man who maintains that the 2,000,000 Americans were justified in casting off the yoke of George III, and Lord North, is to maintain that the 4,000,000 of the Southerners were not justified in casting off the yoke of Mr. Lincoln and his ministry. The treachery of Floyd and others is as hateful to me as it is to you, and slavery is perhaps, if that be possible, more hateful; but I cannot see that either of these things touches the real question, which, as I conceive, is now whether 4,000,000 of men, resolute and determined to stand alone, have not on any ground, most certainly on American ground, the right to stand alone. It seems to me that the war has been for sometime past, on your part, a simple war of conquest, and with wars of conquest and coercion, whether waged by despots or by republics, I have no manner of sympathy."

It was many months after this before he began to see that the cause of the war was not the tariff, but slavery, and that the North was imbued with a patriotic desire to preserve the Union, and from this time he became a faithful friend of the government at Washington. But the Trent affair gave his sympathies a severe

wrench. The acclamations of the people of New York and Boston, and the comments of the Northern newspapers over the illegal act of Wilkes in taking Mason and Slidell from the British vessel, the Trent, distressed him. "I must," he wrote, "unlearn Lord Stowell and burn Wheaton, if there is one word of defense for the American lieutenant." He lamented the extreme measures taken by the administration of the Northern States, the wholesale arrest of suspects, and their imprisonment without trial. "The love of liberty," he wrote Mr. Binney, "seems to have gone to sleep and to have died out in your country. The arrest of citizens on false pretexts, or none, the suspension of the habeas corpus, and the cry for 'strong measures' are indications to our minds here that true freedom has ceased to be regarded as the first object either by the governors or the people. And there is, to me, no more fearful or crushing despotism than that of an irresponsible government elected by popular suffrage. . . . It is one of the most detestable inventions of that odious profligate in France, the despotism founded upon universal suffrage, which he has there succeeded in establishing. I know that there are times when vigorous measures are essential, and the substance and not the forms of freedom should be regarded. I only hope that there is more care for the substance than the utter carelessness about the forms seems to show now amongst you."

CHIEF JUSTICE COLERIDGE landed in New York in August, 1883, as the guest of the New York Bar Association, which had the year before invited him through our secretary of state and minister to England, "as a help to that cordial understanding between our two countries which both of us have at heart," and for the next two months he was entertained at an endless succession of dinners, banquets and receptions, until he was obliged to explain that it was only the lord mayor who was able to dine eight or nine times in one week. He sat for one day with the Supreme Court of the United States, and did ever a company of lawyers gaze upon a greater bench than those who in that room in the capitol at Washington on that memorable afternoon saw in one court the chief justice of England and the "most august judicial tribunal in the world," as Lord Dufferin described the Supreme Court of the United States when he was governor-general of Canada. But the chief justice does not seem to have enjoyed quite so much his visit to the house of the richest American of that day, William H. Vanderbilt of New York. "The richest man in the world asked me to dine and I went. The house is fabulously splendid, very magnificent, but no repose anywhere. It streams money down the walls, up the staircase—silver was nothing accounted of in the days of Solomon. 'Yes, Mr. Vanderbilt,' I said, 'there

has been nothing like it since Aladdin's Palace. It only wants the Roc's egg.' You should have seen his face. He had not the least notion what I was talking about, and I shouldn't wonder if, by this time, he has given a commission for a dozen."

HE was an old friend of Goldwin Smith, but for reasons which came out later he was prevented from going to Toronto to see him, so the professor came to Buffalo to see the judge. He was much pleased with the American lawyers he met. "It is impossible," he afterwards wrote, "not to be pleased with the people, those of them at least that I have seen. They have been chiefly, but not exclusively lawyers, whom De Tocqueville called fifty years ago, and Goldwin Smith, about five weeks ago, the aristocracy of the country. But these men whom I have seen are a real aristocracy. From the absence of a capital, in our sense of the word, the good and able men are much more diffused than they are with us. I have been in twenty of the states, and in every one of the towns where I have been, I have found five or six men quite first rate, and yet content to live in these secondary cities, to lead them and to pass their lives as centers of a pleasant, cultivated society, with not much desire, apparently, of ever going any farther or aiming any higher." He "fell in love" with President Arthur, "a very nice looking, well read, well mannered, courteous gentleman, looking and acting the president to perfection." He "worshipped at the shrine of Mount Vernon," thought Boston the most beautiful city, and the State House there the most beautiful building in the country. "At Washington, at Albany, at Chicago, and elsewhere, you see much grander and more costly structures, but this is in perfect taste and proportion: every interspace the right size, every moulding right, every decoration refined—a sort of Adams architecture of noblest type. . . . The situation is noble, and has been made the best of." He visited Niagara with Goldwin Smith and thought William M. Evarts "the finest specimen of the American gentleman and lawyer." He was entertained by the bar associations of Cincinnati, Louisville and other cities, and returned home with pleasant memories of the American judges and the American lawyers.

IN a speech made at a banquet given him by the Chicago bar, he referred to the hereditary connection between his family and certain distinguished Americans, and claimed to be regarded not as a stranger but a guest-friend. "It is true that from an early period of my life I have admired and respected this great republic. I have never had anything to unlearn. My father was the friend of some of your great lawyers and statesmen who have gone to

their account. Story, Webster and others have dined in his house and have pressed his hand. I have had the honour of seeing them. One other man—one I know not whether known in this country, but certainly profoundly respected by me and all who bear my name or know anything about him—Horace Binney of Philadelphia—was my father's intimate friend. Therefore, I came to a land which I have been taught to respect, and my experience of it only shows how wise was the teaching I received."

THERE was but one unpleasant note to mar the harmony of the Chief Justice's visit. Only a few months before he left England, he had tried and sentenced the Fenian dynamiters, Thomas Gallagher and others, to penal servitude for life. It was not impossible that these sentences would endanger the life of the judge, and, accordingly special precautions for Lord Coleridge's safety were offered to Lord Granville, the British foreign secretary, on behalf of the government of the United States. A cipher telegram to this effect was sent to Minister Lowell, and a translation forwarded to the Chief Justice. "The government of the United States," said the telegram, "desiring to show our guest every mark of attention and respect, has directed Lieutenant John McClellan, of the army, to assist in escorting him through the country as its representative." But the precautions were, after all, needless, for when he was leaving for home, Lieutenant McClellan assured him that he might have safely accomplished his journey had he traveled just as an American gentleman ordinarily travels. The anxiety of the English government, however, kept him from visiting his friend at Toronto, for while he was in New York a private dispatch came to the English consul general from the secretary of foreign affairs at London in these words: "Tell the Chief Justice we are of opinion that he should avoid if possible going to Canada, if there is any risk we think it greater there than in the United States. Granville."

THE DOCKET has one personal reminiscence of the visit of the Chief Justice to the United States. In the first week of October, 1883, he came to St. Louis for a day and was given a reception by the St. Louis Bar Association at the St. Louis Club, then located on Washington avenue. The DOCKET was a very young member of the bar at that time, but he had heard much of the Chief Justice, not only as a jurist, but as the best after-dinner speaker in England. The DOCKET was not disappointed, for the reply of the Chief Justice to the address of welcome by Samuel H. Treat, then United States district judge, was a gem. Lord Coleridge began by disclaiming in his delightful way the rather

flattering words of the federal judge. "For myself," he said, "accustomed as I have long been to the criticism of English writers, I have some difficulty in recognizing in the far too flattering portrait given in this address, any traces of the features of the original with which I have been so long familiar in the severely truthful mirror of English newspapers. But the truth obliges me to say that, as we all know, distance lends enchantment to the view; and as the English portrait painters are much nearer to their subject, so it is tolerably certain—especially as one knows that from their omniscience anything like error, anything like personal prejudice, anything like hard feeling is, from the necessity of the case, uniformly absent—it is quite certain that the English portrait will be more correct than the American. I can only say sincerely that I am not aware that I have risen in our common profession by any dishonorable are, and I can truly say that I have devoted the best of those poor powers which alone I can command to the discharge of the many complicated and most important duties of the high office which it is my lot to fill."

He then spoke of the recent reform in court procedure in England, and the difficulties he had encountered. "But, our common law has had great dangers to meet and overcome. The wise and broad liberality of Lord Holt and Lord Mansfield would have antedated many of those salutary changes which are now embodied in the law, had it not been for the narrow and unbending learning of Lord Kenyon and Lord Eldon, which postponed them for nearly a century. And in the same way the broad and manly sense of the judges of the Queen's Bench and of the Common Pleas, in the times of Lord Denman and Lord Campbell, were overborne and crowded out and overruled by a great lawyer indeed, but a man of the most narrow technicality, who, when he was young, dominated Westminster Hall with the most despotic sway. I mean Baron Parke, who was afterwards known as Lord Wensleydale. He was a man who used to rejoice in non-suiting the plaintiff in an undefended cause, that is to say, doing what by the very nature of the case was injustice. He resisted with the utmost of his ability the very slightest attempts that were made to allow amendments in the pleadings. For, said he, 'Good heavens! Think of the state of the record.' That is, he thought of the parchment. The clients were nothing. And he set himself deliberately to destroy and defeat the intentions of the English Parliament in 1852 and 1854, to introduce something of an equitable breadth and freedom into our common law procedure as it existed at that time, and he succeeded. I should be sorry to think that this was a fair description of everything

existing at that time, but I remember a great and esteemed lawyer—I do not know whether his name has reached this side of the Atlantic in the honor and distinction it should, I allude to Mr. Justice Maule, one of the most powerful intellects I ever knew, and at the same time a man who was certainly gifted with a slight turn of friendly satire. I remember once hearing him say in court to a gentleman of the bar who was arguing, ‘Well,’ he said, ‘that seems a horror in morals and a monster in argument. Now, the case in Meeson and Wellsby that lays it down is the law.’” Then came this clever and sarcastic touch: “I do not want to say a single word against the moral worth nor the intellectual force of these men. They were learned men, and men of extraordinary power; men who, if they had not had that extraordinary power, could not have done what they did; because I have learned what you know, that in literature, in morals and politics, in anything that you please, a man, to do much harm must be an able man and rather a good one.” And he concluded: “But the common law, happily, has survived these dangers. It has survived to guard our freedom with its own great majesty. It has survived to be one amongst the many links which I hope bind England and America indissolubly together. England is in a certain sense the mother, and America is the child. And the mother, like other mothers, suffered many pangs and much sorrow at the birth of her child. But now all those have passed away, and ‘she knoweth no more sorrow,’ for the joy and the pride with which she looks upon the greatness and the glory of what she has brought forth.”

EIGHT years later the DOCKET visited London for the first time, and being introduced to the Lord Chief Justice as one of his hosts at St. Louis, was most cordially received and was shown many courtesies by the head of the English Common Law Bench. He has still in his possession this short note. “Admit the DOCKET to all the law courts. Coleridge, L. C. J. Law Courts. July 9, 1891.” And last year when he went to England to study criminal procedure, he received a similar introduction to the English court rooms from the present Chief Justice of England, Lord Alverstone, and had the honor of an invitation to sit on the bench with the present Lord Coleridge.

BOOK REVIEWS.

THE LAW OF MUNICIPAL CORPORATIONS.—By JOHN F. DILLON, LL. D., Author of "The Laws and Jurisprudence of England and America"; President of the American Bar Association, 1891-92; formerly Circuit Judge of the United States for the Eighth Judicial Circuit; Chief Justice of the Supreme Court of Iowa, and Professor of Law in Columbia University. Fifth Edition. Thoroughly Revised and Enlarged. Five Volumes: Little, Brown & Co., Boston. 1911.

This great work, one of the American legal classics, has been many times reviewed in these columns, as often as the previous four editions have appeared. Our estimate of this distinguished author and his valuable and learned treatise on the Law of Municipal Corporations was given last month in the same number of the REVIEW in which his portrait appeared. Our readers are referred to that article, *ante*, page 588.

THE AMERICAN STATE REPORTS.—Containing the cases of general value and authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the Courts of Last Resort of the several States. Selected, reported and annotated by A. C. FREEMAN. Vols. 137-138: Bancroft, Whitney Co., San Francisco. 1911.

With the usual careful selection of cases which this series presents to the profession, Volume 138 contains valuable and extensive notes on Who Are Accomplices; Revocation of Agreements to Arbitrate; What Constitutes Desertion as a Ground of Divorce; Admissibility in Evidence of Books of Account; Grounds for the Removal of Executors and Administrators; Signing Contracts in Ignorance of Their Contents, and the Delivery and Acceptance of Policies of Insurance. The notes in Volume 137 are on Contempt Proceedings to Enforce Payment of Alimony; the Effect of Failing to Execute and Record a Chattel Mortgage; the Estoppel of a Municipal Corporation to Contest Illegal Claims or Expenditures; Proof of Death in Life and Accident Insurance; Personal Liability of Judges and Judicial Officers; the Duties of the Tenant for Life to the Remainderman and Reversioner; Description of Property in Mortgages; What Is Vagrancy, and the Waiving of the Vendor's Lien.

THE LAWS OF ENGLAND.—Being a complete statement of the whole law of England. By the RIGHT HONOURABLE, THE EARL OF HALSBURY. Volume XVI. London: Butterworth & Co., 11 and 12, Bell Yard, Temple Bar. Rochester: N. Y. Lawyers' Co-Operative Publishing Company. 1911.

The sixteenth volume of this monumental work contains but three titles, but they are very valuable ones, namely: Highways, Husband and Wife, and Income Tax. Everything that has been said in the REVIEW in praise of the preceding volumes might be repeated as to the present volume. The

title *Husband and Wife* is the work of one of the judges of the probate and divorce division of the High Court of England, assisted by two barristers.

HANDBOOK ON THE LAW OF PARTNERSHIP, INCLUDING LIMITED PARTNERSHIPS.
—By EUGENE ALLEN GILMORE, Professor of Law, University of Wisconsin.
St. Paul, Minn.: West Publishing Company. 1911.

As stated by Professor Gilmore in the preface to this book, the original arrangement with the publishers contemplated not an entirely new treatise on the Law of Partnership, but merely a new edition of Mr. William George's text on that subject. After the work was begun, however, it was deemed advisable to abandon Mr. George's text for the most part, and to prepare a substantially new treatise, using such portions of his work as were found suitable. This plan was followed and with the exceptions of Chapters VIII and IX, which are reproduced substantially as found in Mr. George's book, with the addition of later cases, the present book, both in arrangement and text, is new.

Professor Gilmore uses practically the same classification as he used in his cases on the Law of Partnership and it would be difficult to surpass this classification, with its many excellent qualities. It is so logical and convenient that one can readily find a discussion of the proposition in which he is interested, a merit which is, by no means, possessed by all texts on this subject.

This treatise is one of the Hornbook series, with the leading principles of this branch of the law stated in black letter type, a meritorious plan, which has received the decided approval of the legal profession.

In this work will be found a clear and definite statement of the leading principles of the law as it is, and but little space is devoted to the discussion of controverted points or to the advancement of new theories. The citations, while not exhaustive, are sufficiently full for practical purposes. The book is sure to receive the hearty approval of both practitioners and students.

HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS. Second Edition. By HENRY CAMPBELL BLACK. St. Paul, Minn.: West Publishing Co. 1911. (Hornbook Series.)

This is a new edition of a volume of the same title published in 1896. Recent citations have been inserted and the text has been revised and in some places rewritten. The chapter on "Interpretation of Judicial Decisions and the Doctrine of Precedents" has been omitted in the later edition, but two chapters on "Construction of Statutes as a Whole and with Reference to Existing Laws" and "Adopted and Re-enacted Statutes," have been added. The author is in sympathy with the recent changes in the attitude of the courts toward more liberal construction of statutes, and his work is an "endeavor to give adequate expression to the one cardinal and fundamental principle of all true interpretation, that the actual intention of the legislature should in all cases be sought out and made effective." It is a valuable handbook for the practitioner's library.

SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER. Vol. II. Edited from the Records in the Public Record Office, by I. S. LEADAM, of Lincoln's Inn, Barrister-at-Law. Selden Society Publications. Vol. XXV, for the year 1910. London: Bernard Quaritch. 1911.

Some eight years ago much new light was thrown on the vexed question of the origin and character of the so-called Court of Star Chamber, by the publication, under Mr. Leadam's able editorship, of a volume of select pleas of this court or council gathered from interesting records preserved in the Public Record Office. This material showed clearly that the origin of the Star Chamber, or "camera stellata," is to be sought for in connection with the supreme jurisdictional power of the crown and that the exercise of this power in the form of judicial proceedings of the King's Council in the Star Chamber was merely defined by the famous statute of 1487, which has often been erroneously considered as the origin of a Court of Star Chamber. In his scholarly introduction to his first volume, Mr. Leadam discussed the relation of the Star Chamber to the King's Council and the character and importance of the cases selected as illustrations of its activities under Henry VII. The present volume is a continuation of the former one and covers almost the entire reign of the second Tudor ruler, Henry VIII, from 1509 to 1544. Taken together, the two volumes, with their introductions, furnish a most valuable and unique view and discussion of a great and much misunderstood legal administrative institution. Our views of the Star Chamber have been so colored and distorted by reason of its later prominence as an agent of Stuart tyranny that its popular and beneficent activities during the early Tudor period have been overlooked and forgotten by many historians and legal writers. It will be the purpose of this review, therefore, to bring out the character and scope of its legal and administrative activities in relation with popular welfare under Henry VIII.

The progress in English government and law has been steadily towards centralization and nationalism. The first governments were tribal kingdoms, the first laws were tribal codes. Then came a period of Anglo-Saxon nationalism, with government and law both largely decentralized. The Norman conquest resulted in a strong centralized monarchy, with little nationalism but some support from the people as against feudal decentralization, which meant anarchy, and the continental imperialism of the Roman Church. Feudalism and the Church were both brought under royal control, and Henry I and Henry II established a system of legalized despotism or a "rule of law," in which is to be found the origin of most of the great legal institutions and practices of English law. Excessive royal tyranny under Richard I and John, together with the growth of a national baronage and a national church, resulted in the famous limitation on the royal power known as the Magna Carta. The reign of Henry III saw an attempt at aristocratic oligarchy under Simon de Montfort. This was foiled by the energy and ability of Prince Edward, who adopted a national policy, which drew to him a portion of the baronage and large numbers of the towns. He thus became the first really national king since Harold and established government and law on a centralized and national basis.

though not, as has sometimes been stated, on a popular or democratic basis. There was as yet no democracy in the modern sense. With the reconciliation of various discordant elements into a national system under Edward I, modern English development may be said to have begun. A parliament, composed chiefly of land owners and well-to-do merchants, developed rapidly and, through its growing control of taxation and legislation, it imposed severe restrictions on the royal executive and administrative power. Two of the later Plantagenets were deposed by aristocratic parliamentary agency and the Lancastrian parliamentary kingship was the result. The policy of the Lancastrian rulers, however, was static and almost reactionary and by the adoption of a more popular attitude in matters of trade and commerce the legitimist or Yorkist faction grew strong enough to control the government and then gain the crown. With their triumph the prestige of parliament declined and the King's Council came to stand as the friend and protector of the people against aristocratic oppression. The Council, in certain cases of special import, sat in the "camera stellata," or Star Chamber, and thus a sort of judicial committee of the Privy Council was developed. The Yorkist monarchy collapsed on account of personality rather than policies. Henry Tudor not only married Elizabeth of York—he became firmly wedded to his deceased father-in-law's policies. The real break in English history for the fifteenth century should be the fall of the Lancastrian parliamentary monarchy, rather than the Yorkist collapse, which meant a change of rulers and hardly anything else.

Henry VII had little difficulty in getting the sanction of a factional and subservient parliament to the Yorkist-Tudor system of government and law. Aristocratic parliamentary government of the mediaeval type had had its day and it was to be two centuries and more before Puritan lawyers and statesmen were to win the fight for the theory of parliamentary supremacy over the crown and the courts. The enemies of the new strong monarchy in the later fifteenth and early sixteenth centuries were the great landholders and aristocrats and it was to curb these and to protect the "people of lesser degree" from any high-handed oppression that the Star Chamber procedure was instituted. It will thus be seen that the Star Chamber, speaking historically, was a manifestation of popular government of a non-representative character as against aristocratic government of a narrow, non-democratic representative type.

While exercising judicial powers of a definite sort from Edward III's time on it was not until 1453 that an act of parliament empowered the chancellor to enforce the attendance of persons summoned before the King's Council, by writ of privy seal, in such cases as were not determinable by common law. The increase of royal power in the next forty years, the turmoils and dissensions in the realm, the lack of good local justice, and the vexatious delays in the central courts all favored an enlargement of the judicial functions of the King's Council. The statute of 1487 provided for a committee or commission of not more than seven persons consisting of the chancellor, the treasurer, the keeper of the privy seal, or any two of them, with a bishop, a temporal lord, and the two chief justices, or in

their absence other justices. This body was to take cognizance of "unlawful maintenance, giving of licenses, signs, and tokens, great riots and unlawful assemblies." Broadly construed, it was given power to remedy abuses against public order and to act as a supervisory and admonitory organ of the strong monarchy. That it was regarded with suspicion and dislike by the courts of common law there can be no question. The two chief justices seldom attended and the proceedings of the Star Chamber were marked by an absence of legal forms and procedure. It was perhaps this fact that led the common law courts to a more steadfast and unwavering allegiance to ancient procedure and delayed law reform in England, and also in America, by traditional usages. If the American legal profession in general knew more of the history of English law they would be more willing to reform legal procedure in this country. To some of the profession the axiom of "where ignorance is bliss (or litigatory profits) 'tis folly to be wise" might apply, though surely not to all. There was some reason for the adherence to technicalities in early modern English law. It would be hard to give any valid reason for adherence to obsolete procedure and practice in twentieth century American law. The methods of the Star Chamber were direct and informal and might easily become arbitrary and unjust, as indeed they later became. All sorts of evidence was admitted, even hearsay, and the lack of thorough legal knowledge and training on the part of the royal counsellors was often evident. The tendency was towards conciliar judicial control and, in 1529, an act was passed making the president of the council a regular member. He had already sat in the Star Chamber and this merely made his position more legal. In 1540 a statute was passed giving royal proclamations the force of laws and enacting that those who offended against such proclamations should be punished by the officers of the crown, together with some bishops and judges, "in the Star Chamber or elsewhere"—this "elsewhere" meant the council in any other form of session.

That the dictum of Sir Thomas Smith to the effect that the object of the Star Chamber was "to bridle such stout noblemen or gentlemen who would offer wrong by force to any manner of men, and cannot be content to demand or defend the right by order of the law," is not far short of the truth, is shown by the interesting array of cases having to do with the public welfare which Mr. Leadam has collected. Instead of being active in a political-tyrannical way, as we are prone to imagine it was, we find the Star Chamber performing functions of an economic-legal character, such as we associate today with our Interstate Commerce Commission and sometimes with our federal courts. Greedy sixteenth century capitalists who were guilty of regrating, engrossing, or forestalling, or, in modern parlance, "cornering the market," to the harm of the community, are summoned before the Star Chamber which definitely undertook "the regulation of trade, especially in those branches of it which most nearly concern public tranquillity, the trade in foodstuffs." The eagerness with which people sought redress from the Star Chamber indicates, as Mr. Leadam says, that "the Court of Star Chamber, like the Court of Requests, was at this time invoked as the protector of the weak against the strong, of the commonalty

against aristocratic oppressors." Thus we have the interesting and remarkable series of pleas in which the inhabitants of the village of Thingden are pitted against the wealthy landowner, John Mulsho, over the question of enclosures. The case of Bareth and Others vs. Newby, over forestalling, regrating and engrossing, is another example. Two interesting cases are concerned with survivals of serfdom or bondage, and several have to do with the maintenance of the government's policy of controlling prices and export and import trade. In all of these there is much of value for the student of law, history, or economics, and also, incidentally, for the student of society. Each important case is carefully discussed and analyzed in the lengthy introduction to the volume, a careful reading of which is a liberal education on the subject of the Star Chamber in the sixteenth century.

The editing, introduction, notes, and appendixes, of which last there are several of great economic interest and importance, have been done with the usual care, diligence, and scholarship characteristic of the publications of the Selden Society. The proofreading, however, has been a little careless in places, as on p. 10, line 18, where 1911 is printed for 1511; also the omission of the word "of," on p. 25, and the occasional lack of note numbers. In all other respects the volume is a pleasure and delight and is a welcome addition to the long row of blue tomes previously published by the great legal society of England.

BOOKS RECEIVED.

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- REMINSCH (P. S.) *Public International Unions*. Ginn & Co., Boston, Mass., 1911.
- CHAMBERLAYNE (C. F.) *Modern Law of Evidence*. Vol. II. Matthew Bender & Co., Albany, N. Y., 1911.
- DILLON, JOHN F. *Municipal Corporations*. 5th Ed. 6 Vols. Little, Brown & Co., Boston, Mass., 1911.
- AMERICAN STATE REPORTS. Vol. 138. Bancroft-Whitney Co., San Francisco, Cal., 1911.
- WENBERG (H.) *Capture on War, on Land and Sea*. P. S. King & Son, London, England, 1911.
- ARAIUS (H.) *The Panama Canal*. P. S. King & Son., London, England, 1911.
- BLACK (H. C.) *Interpretation of Laws*. West Publishing Co., St. Paul, Minn., 1911.
- GILMORE (E. A.) *Law of Partnership*. West Publishing Co., St. Paul, Minn., 1911.

All communications for the editor should be sent to

JOHN D. LAWSON,
14 South Broadway,
St. Louis, Mo.



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THE SUBJECT

THE AMERICAN LAW REVIEW.

NOVEMBER-DECEMBER, 1911.

A TRIAL FOR MURDER IN ENGLAND.

(Continued from page 707).

THE CASE IN THE COURT OF CRIMINAL APPEAL.

On July 22d, the appeal of the prisoner came before the Court of Criminal Appeal, sitting at the Royal Courts of Justice, in London. The prisoner was not present, the appeal involving only questions of law, and he was represented by the same counsel as on the trial at Newcastle. The court was composed of the Lord Chief Justice of England (Lord Alverstone), Mr. Justice Lawrence and Mr. Justice Phillimore.

Mitchell Innes, K. C., with Lord William Percy for the prisoner.

The grounds of appeal in the notice were (a) misdirection, (b) comment by the prosecution on the omission of the wife of the prisoner to give evidence for the defense, (c) withdrawal of evidence from the jury. The misdirection and withdrawal of evidence involved the same point. The learned judge in his summing up dealt first with the question of motive. Evidence of motive cannot supplement the absence of evidence connecting the appellant with the death of the deceased. If the evidence is weak on that point, evidence of motive cannot be invoked to supply its place. Before ever the question of motive was reached, the evidence connecting appellant with the crime fell far short of what was requisite upon any criminal charge, and *à fortiori* on a charge of murder. The evidence as to identification by the witnesses for the Crown was in the highest degree unsatisfactory. The prosecution called witnesses to prove that appellant was the person who was seen traveling in the same compartment with the deceased, Nisbet, when the train left Newcastle. The learned judge's summing up on Raven's evidence amounts to misdirection. Raven

spoke to seeing appellant walking with Nisbet at Newcastle Station. My submission is that this was one of those cases where a man, walking to catch a train, either was overtaken by or himself overtook another man, and then unconsciously walked beside him. It was proved that the two were not talking. Appellant was never conscious of being with Nisbet, and further, though he had seen Nisbet earlier, he never saw him after leaving the booking office. Raven admits he never saw the two men talking, but the learned judge did not put this to the jury. Appellant further said that he first went to the urinal and then up platform 5 to the hinder part of the train, and if his story, which on this point is consistent with Raven's evidence, is to be believed, it severs him from Nisbet's company at the important moment. Then there was the evidence of Hepple, an old and deaf man, who had for twenty years been a friend of the appellant. Hepple's evidence was no doubt given in perfect good faith, but clearly for the purpose of identification we have to rely upon Hepple's powers of observation solely. His evidence is to the effect that either appellant or his companion had his hand on the handle of the door of the compartment into which both were preparing to enter; the witness then says he walked down the platform for a few paces, and that when he turned round the two men had vanished. Therefore, having his back to appellant, he was quite unable to say with certainty what happened. Hepple's evidence had a certain force added to it by that of the next witness to identification, Hall; but if Hall's evidence is discredited, that would materially affect the force of the evidence given by Hepple. Hall's evidence was that he (Hall) in the company of a fellow-clerk entered the same train as the murdered man, and that he saw Nisbet and a companion whom he did not know get into an adjoining carriage. Three days later Hall was taken to the police station for the purpose of identifying the person he saw getting into the train, and he there pointed Dickman out as "very much resembling the companion" of Nisbet. More is now known about the circumstances attending the identification at the police station, and an inquiry on that subject was addressed by the Home Secretary to the Chief Constable of Northumberland. The reply from the Chief Constable I now propose to put in.

[The LORD CHIEF JUSTICE: That is not the proper way of bringing evidence before the Court.]

We now know that Hall, before purporting to identify appellant, had been invited to try and see him through a window, and that, subsequently, before the identification, he had a back view of appellant at the police station. In view of the great gravity of the case, I feel I must ask for permission to put the letter in.

The Court refused the application.

Tindal Atkinson, K. C., for the Crown: Hall is in court.

Percival Harding Hall, recalled and cross-examined by *Mitchell Innes, K. C.* (by permission of the Court), said that on March 21 he was taken with another witness, Spink, into a passage at the police station, where some policemen in plain clothes were standing about. They were kept waiting for some ten minutes. Immediately after they arrived, they were

invited by one of the persons present, presumably a detective officer, to go outside and look through a window. Witness said he could not remember having had any conversation with the people in the passage, nor at that time did he discuss the appearance of the man whom he had come to identify. Witness could not explain why he was invited to look through the window, and he thought it a most irregular proceeding. He saw nothing through the window, and indeed he protested that it was ridiculous to expect him or Spink to get a view through the window. They were then taken to the door of a room, in and out of which a few officials were occasionally passing. It was on one of these occasions that they were asked to look through the slightly opened door. They did so: They saw a man sitting in a chair leaning over to another man, and apparently in conversation; the former man had his hat off, and wore a light overcoat. The witness saw the color of his hair. The witness had no recollection of any conversation with anybody about the appearance of appellant between the time he came back from the window and the time he looked through the door. After this latter view of the man, they went upstairs to the room where they were to identify the man; this was an hour and a half afterwards. When they got into the room he saw that the appellant was wearing a coat similar in color to that worn by the man he had seen through the door.

Further examined by *Tindal Atkinson, K. C.*, witness said that on the evening of March 18, which was the evening of the day of the murder, he gave an account at the police station of the appearance of the man he subsequently saw at that station, and that he then described his overcoat as a light fawn overcoat. The impression the witness got in his view through the doorway almost led him to make up his mind that the man was not the man he had seen in the train, because the man at the police station seemed from a back view so much more massive. Spink and the witness had both discussed that at tea, and came to that conclusion.

[The LORD CHIEF JUSTICE: Although we have our own opinion as to what took place at the police station, we must say that the question of identification by Hall is not so important as it would have been had the case for the defense been that Dickman was not in the train at all.]

Mitchell Innes, K. C.: I do not propose to deal with the irregularity; but at the same time, although Hall denies that the view through the partially opened door assisted him in his identification, he did see a man wearing a light overcoat, and was able to recognize the color of his hair.

I now propose to put in evidence a statement made by Mrs. Nisbet in response to a request by the Home Secretary for information as to whether she had known Dickman by sight for a number of years.

[The LORD CHIEF JUSTICE: We have frequently declined to listen to statements of the kind you now suggest. No doubt the Home Secretary receives all manner of communications from interested friends or from the prisoner himself. The mere fact of their being addressed to the Home Secretary cannot make them evidence.]

Tindal Atkinson, K. C.: I may say that Mrs. Nisbet is in Court.

The statement was then allowed to be read on the distinct understanding that it should not be regarded as a precedent.

Mitchell Innes, K. C.: The statement is this: "I am the widow of J. I. Nisbet, to whom I was married about eighteen years ago. I first knew the prisoner Dickman shortly after I was married, and then only by sight. I was never introduced to him and never spoke to him. On March 18, when speaking to my husband at Heaton Station, the view in profile I got of my husband's companion did not enable me to identify him as anyone I knew. On giving evidence at the police court I never saw the prisoner until I had finished my evidence, when I caught sight of him in the dock. He was in the same position and I had the same view of his profile as I had in the train, and I then recognized him as being the same man. I then fainted, and was carried out of court."

My submission is that it is curious that Mrs. Nisbet, having a clear view of appellant's profile at Heaton Station, could not recognize him; it was still more curious that she was able to recognize him in court, when she was unable to recognize him in the railway carriage. Further, the debility and distress under which she labored at the hearing before the magistrates made her evidence unreliable.

[PHILLIMORE, J.: She does not say that it was Dickman she saw in the train; she says that the profile of the man she saw in the carriage was the profile of the man in the dock at the trial.]

Leaving the question of identification, I submit that the date when the bag was found is significant. The bag was found down an airshaft as late as June. It was put there, I suggest, by the real murderer after the hue and cry had ceased. The airshaft had been searched between the murder and June and nothing found. Dickman could not have put the bag there because he was arrested a day or two after the murder.

[THE LORD CHIEF JUSTICE: One would think that a man would have destroyed the bag instead of keeping it and then putting it down the pit. He had from March to June in which to dispose of it.]

It is not impossible that the murder was committed north of Morpeth. The train was a slow one, stopping at five stations between Heaton and Stannington. It should have been put to the jury that there were thus five intervening stations at which interchanges of passengers could take place. The learned judge was under the impression that Stannington was the next station after Heaton. There is no identification of the appellant in the carriage north even of Heaton. The real murderer may well have left the train while in motion; yet the learned judge assumed that the theory of the murder taking place north of Morpeth was practically untenable.

[PHILLIMORE, J.: There was doubtless plenty of opportunity for change. But appellant does not suggest that; he says, "I never changed carriages."]

I say that, having regard to the theory of the prosecution of continued identity from beginning to end, this was a point that should unquestionably have been left to the jury. Appellant's case, it is true, was quite different; he said he got into the carriage far behind.

It is true appellant took a ticket for a station short of Morpeth, but

that he went as far as that place and paid excess fare. He therefore, by giving up a Stannington ticket at Morpeth and paying the excess fare, voluntarily supplied the prosecution with the means of identifying him. Appellant himself gave the police their first information on this point. He was not seen carrying Nisbet's bag at Morpeth, and it is a bag large enough to attract attention.

Again, as to the pistols; two must have been used, according to the prosecution, as the bullets found in the body were admittedly different; in other words, the murderer changed pistols. No pistol has been traced to the appellant.

That is the case for the appellant on the facts. On the law my submission is that by sect. 1 (b) of the Criminal Evidence Act, 1898, the prosecution is forbidden to comment on the failure of the wife of the accused to give evidence; counsel for the prosecution did comment on the fact that the appellant's wife had not been called to corroborate the appellant's statement that his wife had cleaned his overcoat. No doubt the jury were subsequently told that they were to dismiss the comment from their minds, and the foreman answered that they had not paid the slightest attention to it. No one can say with certainty what the effect on the individual minds of the jury might have been. The statutory prohibition is absolute in its terms.

[The LORD CHIEF JUSTICE: Mr. Tindal Atkinson did make a reference to that fact, but withdrew it in presence of the jury, who were instructed by the judge to take no notice of that reference. The foreman of the jury stated, in fact, that their minds had not been influenced by the reference.]

I submit, in spite of that, that this is a case in which there has been a mistrial, or what some judges call a nullity. I do not suggest that on this point alone the prisoner should get off scot free, but I do contend that there has been a mistrial. I admit that Mr. Justice Coleridge gave a strong direction to the jury not to consider the overcoat as evidence.

[The LORD CHIEF JUSTICE: And with the coat they had to disregard the fact that the wife was not called.]

Having regard to the importance attached by Mr. Justice Coleridge to the rest of the evidence as to blood on the clothes, it would be extremely difficult for the jury to avoid being influenced by the question of the wife not having been called. Then there was the incident at the conclusion of the trial. Mr. Justice Coleridge asked the jury if they had allowed themselves to be influenced by the fact that the prisoner's wife had not been called. In that case, his Lordship said, the jury would have to reconsider their verdict. On this, the foreman of the jury, without consulting his fellows, said it had not influenced the jury in coming to their decision.

[The LORD CHIEF JUSTICE: I cannot allow this. The foreman replied in the hearing of the rest of the jury, and I cannot allow it to be suggested that the reply was not made by the whole jury. If this point were to be taken, it should at least have been suggested at the time that the rest of the jury should be consulted.]

MR. JUSTICE PHILLIMORE: The foreman speaks for the whole jury.

The LORD CHIEF JUSTICE: After the scrupulous fairness with which this

case has been tried by Lord Coleridge—especially on this point—I cannot allow it to be suggested that the foreman was not speaking for the whole jury.]

Lord William Percy: There was no deliberation amongst the members of the jury before replying to the question put to them by Mr. Justice Coleridge.

[The LORD CHIEF JUSTICE: The question was repeated. I cannot allow the suggestion to be made.]

Tindal Atkinson, K. C. (with him Lowenthal), for the Crown, was not called upon.

The LORD CHIEF JUSTICE: This case has given us occasion for the most anxious consideration. We have examined very carefully all the evidence before the sitting of the court, so that we might be in a position to appreciate all the arguments.

I desire to mention two points before dealing with the case itself. The first is the attempt to make communications to the Home Secretary evidence in this case. We are sitting here as a court of law, and possess large powers in certain events which are only to be exercised on the consideration of legal evidence. We do not consider matters brought before us except upon such evidence. No doubt the existence of such correspondence may lead the court to make further inquiries, and to require the production of further evidence. It must not be supposed, however, that the reading of such communications amounts to the giving of evidence. If it did, people would say that we had allowed our minds to be influenced by them. Therefore, we have confined our attention to the evidence given by Hall on oath. We did not think the other further evidence sought to be given was of any importance, and therefore we refused to allow it to be given. The second point I desire to take is that elicited from Hall in cross-examination by Mr. Mitchell Innes to the effect that when he went down for the purpose of seeing if he could identify Dickman he was first invited by somebody, possibly on behalf of the police, to look through a window, and on doing so did see, sitting alone, the person who was afterwards convicted. We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so. In the present case we have come to the conclusion that, although Hall's identification of the actual individual might have been slightly influenced by what had previously taken place, it has so little bearing on the real merits of the case that it is quite impossible for us to interfere with the verdict on this ground.

Now it has been suggested by counsel for the appellant that the murder

might have taken place north of Morpeth—that is to say, after the appellant had left the train, it being admitted that in that case the murderer must have left the train while in motion; but there is no substantial ground for thinking that that was the case. The learned judge, in a summing up which is one of the most able I have ever read, dealt with that suggestion. It was not disputed that the appellant was in the train which carried the deceased man, that he took a ticket for a station short of Morpeth, but that he traveled as far as the latter place, where he left the train paying excess fare, and that Nisbet's bag was found down the airshaft of the *Isabella* pit about $1\frac{1}{4}$ miles from Morpeth station, and rather nearer Stannington station than Morpeth; and also that the object of the prisoner's journey was to transact some business at Stannington.

I now come to a part of the case which will cause the greatest difficulty to those who may disagree with the conclusion at which this Court has arrived—namely, aye or no, was there sufficient evidence that the man who, between Stannington and Morpeth, murdered the deceased man Nisbet, was the appellant? The evidence was entirely circumstantial, but circumstantial evidence derived from admitted facts proved against a person charged, is often most reliable, because it is not likely to be invented, and if invented, would, in all probability, not fit in with the admitted facts.

We must exclude the fact that he left the train at Morpeth; we must not assume that because he traveled to Morpeth he was necessarily in the carriage with Nisbet. The crucial part of this case is whether there is satisfactory evidence that Dickman entered the same compartment with Nisbet at Newcastle. The evidence at Newcastle is, first that of Raven, who had known the prisoner for eight or nine years, and Nisbet for six years. He saw Nisbet and Dickman come along in the direction of Gate 4 and then did not again see the appellant. The main criticism on this evidence is that the learned judge did not call the attention of the jury to the exact evidence as to whether Nisbet and Dickman were talking together or not. Raven does not speak as to the men being actually in conversation. The theory that Dickman did enter the compartment occupied by Nisbet and then changed to a compartment at the back of the train may be dismissed; it is unlikely in any circumstances. Mr. Mitchell Innes has pressed on us that because the men were not engaged in conversation that in some way or other throws doubt on the accuracy of Raven's evidence. But the appellant denied he was ever in the same compartment with Nisbet, and the jury were face to face with the contradiction between him and the other witnesses. It is suggested that Dickman went into a urinal a little beyond the book stall. But looking at the thing in substance, in order to say whether or not Dickman got into the same compartment with Nisbet, it does not seem to us very important whether they were or were not in conversation, or whether Dickman was absent for some little time, and we think that if the learned judge had stopped to discuss such an incident as that it might have misled the jury. We are satisfied that this cannot, from any point of view, alter the result. Omission is not of necessity misdirection. The story is taken up by Hepple, who knew appellant well, and who had taken his place further back

than the compartment in which Nisbet traveled, and then, as many of us have done, walked up and down outside his compartment for some minutes before the train started. He describes Dickman as going along with his companion; he cannot say whether they were talking, but they were walking in the direction of the engine. Now, if Dickman's defense had been that he never went by the train, the argument of Mr. Mitchell Innes would have been entitled to more consideration. But Hepple has known appellant for twenty years, and, after all, describes a very ordinary incident. The inference from his most natural story is that Nisbet and Dickman stepped into the train together. The theory of the defense is, that if Hepple's evidence is true, Dickman must have come back and got into a carriage at the back part of the train. But assuming Hepple to be right, why should Dickman do anything of the kind? It is said Hepple is old and somewhat infirm; but he had known Dickman for no less than twenty years. Moreover, Mr. Mitchell Innes does not suggest how any physical infirmity affects his evidence.

Then again, Mr. Mitchell Innes contends that the weight of Hepple's evidence depends on the accuracy of Hall's identification. I could not follow the argument. The recollection of Raven, Hall and Hepple was stereotyped in their minds; this murder is noised abroad, and they have to say what they happen to know about it. Even if you eliminate Hall, it does not weaken Hepple's evidence.

Hall's evidence is very important quite apart from whether his identification at the police station was accompanied by the circumstances described. Hall knew Nisbet well as the Widdrington cashier, and knew the errand on which Nisbet was going. Hall speaks to a part of this case which cannot be said to be in dispute, viz., Nisbet and someone he did not know coming along towards that train and getting into the next compartment. There was, therefore, strong evidence that at Newcastle Station the man who got into the train was Dickman; he was identified by all three men, Raven, Hepple, and Hall. I have left Spink out; I do not rely upon Spink's evidence, but it in no way weakens the combined story of the others.

Now that is the case for the prosecution; they shew that appellant entered the train in the part where Nisbet was. It was quite sufficient to call upon the prisoner for an answer, and when he does elect to give evidence, then what he says with regard to the incident is for the jury to consider. The result of the cumulative observation of these men is to throw doubt on his whole story. He absolutely contradicts the recollection of all these three men. There is no motive suggested why he should enter Nisbet's compartment and then change to another; it is far more important to observe that, assuming he was in company with Nisbet, there was no possible motive suggested why he should come back to the rear part of the train. Therefore, the jury having heard it, the judge was justified in leaving it to them. The jury were, therefore, face to face with this contradiction in the crucial part of the whole case.

At Heaton, Nisbet is seen by his wife, and no one can doubt it from the way she tells the story. Her husband was in the habit of making this

journey. She hurries up to Nisbet at Heaton Station, and speaks to another man being there, but was unable to see him very plainly, for he had his coat collar up. She could not say who the man was; but on her examination before the magistrates she says she saw the appellant's profile, and thereupon immediately collapsed in consequence; finally at the trial she says there is no doubt at all about the matter. The passage in the summing up which refers to her evidence is not open to any criticism. At Stannington Station, Hall and Spink got out, and one cannot come to any other conclusion than that the murder took place between Stannington and Morpeth.

It is contended that the jury were directed that the train went directly to Stannington from Heaton without stopping, whereas there were several intervening stations at which other persons might well have entered the compartment or got out. But this does not really affect the question at all, when we consider what the appellant's defense was.

Lastly, we have an incident which is not more than an incident, if the jury had evidence before them that appellant got into the compartment at Newcastle, having a return ticket for Stannington, why did he go on to Morpeth? Then there is his account of it. If the jury were satisfied that there was evidence of his going as far as Stannington, it can scarcely be denied there was a strong case for him to answer.

Is there sufficient in Dickman's answer to throw on undisputed points such a doubt that we ought to say that there has been a miscarriage of justice or that the verdict was unsatisfactory? He says he was reading the paper, and allowed the train to go on without noticing it. It is pointed out, too, that the inspector at Morpeth saw no bag, but recollects that a man did get out and pay 2½d. excess fare. Whether there is a dispute or not as to that incident of the inspector and the bag does not seem to us of very great importance, for he need not have had the bag with him at that moment. The bag is found ultimately down the Isabella pit. It is contended that a doubt is thrown on the case because the bag was not found till June. But the lateness of the discovery does not materially affect the question.

Again, with regard to the pistols, we cannot, in face of all the circumstances, think it is necessary for the prosecution to trace them to the appellant, nor that the case is at all weakened by so little of the gold and silver being found upon him. These were matters to which the Home Secretary might direct his attention. There is another incident which without these various other points might not have been sufficient. I refer to the blood stains on appellant's coat.

With regard to the point based on the comment made as to the not calling of Mrs. Dickman to speak to the stains on the coat, it must be remembered that it had been withdrawn from the jury, and they, indeed, stated that they had not even spoken about it, so that it was impossible for the Court to support the contention that there was a mistrial. It was an accidental slip such as must often occur, and its effect, if any, was removed before the verdict was given.

Upon the merits of the case, therefore, we are against the appellant. We

have thought it right to examine the case with the greatest possible care, having regard to the fact that it rested on circumstantial evidence. We have no doubt that there was a substantial case for the jury shewing that the murder was committed by Dickman, and there is no ground upon which we can say that the verdict was wrong. The appeal must therefore be dismissed. *Appeal dismissed.*

THE END.

A few days later a petition was sent to the Home Secretary from the wife and relatives of the convicted man asking that the sentence be commuted, and on August 3d they received the following reply:

“The Home Secretary has given careful consideration to all the circumstances of the case, and I am to express to you his regret that he has failed to discover any grounds which would justify him in advising His Majesty to interfere with the due course of the law.”

On the morning of August 10, 1910, Dickman was hanged in the county jail of Newcastle-on-Tyne.

PURITANISM AND THE COMMON LAW.

One of the solid political facts of the world of today is the tenacity and vitality of that mode of legal and juristic thinking which we call the common law. It survives and imposes itself upon the huge mass of legislation that is annually placed upon our statute books and sets at defiance the civilian's maxim that later law-makings have more force in law than those which precede them. It has imposed itself upon a French code in Louisiana, and a received Roman law in Scotland, and we find judges in South Africa bearing Dutch names and trained in Roman Dutch Law, reasoning in a Romanized terminology after a fashion that only the Anglo-American can understand. But it is even more remarkable that this mode of thought which exhibits such tenacity and vitality should be intensely individualist in an age that looks more and more to social control for the solution of its problems and is succeeding in the socialization of pretty much everything except the law. For, although it is less true of England, what Berolzheimer says of common-law juristic thought is thoroughly true for America: Its distinguishing marks are, "unlimited valuation of individual liberty and respect for individual property."

The individualism of our common-law is something of more than academic interest. For we have made of the common-law a very *Naturrecht*. We test all new situations and new doctrines by it. We construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislatures intend no innovations upon this common law, and to assume, so far as possible, that statutes were meant to declare and reassert its principles. More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of rights are declara-

tory, we force it upon modern social legislation. Hence the character, the attitude, if I may fall back upon a German word, the *Weltanschauung*, of this body of doctrine becomes of the utmost practical importance. Not merely the jurist, but the legislator, the sociologist, the criminologist, the labor-leader, and even, as in the case of our corporation law, the business man, must reckon with it. For the fundamental conceptions of our traditional case-law have come to be regarded as fundamental conceptions of legal science.

Professor Seligman tells us that there are five ways of interpreting history. The idealistic interpretation of history, which reached its highest development with Hegel, sought to interpret all historical growth in terms of thought and feeling. The religious interpretation, found the clew to human progress and the determining influence in human development in religion. The political interpretation, a method beginning with Aristotle, which has governed our political thought and has been the favorite in England and in America, found the clew to progress in a gradual but definite movement from absolutism to freedom in political institutions. The physical interpretation, beginning in Vico and Montesquieu, but first worked out scientifically by Buckle, found the controlling factors in physical environment, and looked to external causes, to climate, food and soil, to explain social development. Finally, the economic interpretation, of which Marx is the chief exponent, proceeds upon the theory that "economic institutions are historical categories, and that history itself must be interpreted in the light of economic development." In like manner one might show that there are five ways of interpreting jurisprudence and legal history, and that the several schools of jurists divide themselves according to the interpretation for which they stand. The idealistic interpretation traces the development of the idea of justice as an ethical and moral phenomenon. It seeks the metaphysical or philosophical basis of justice and right as ideas. Upon the for-

mer it builds legal history, upon the latter, jurisprudence. This is the method of the philosophical school of jurists today, and it is significant that the Neo-Hegelians are the dominant force in that school. The religious interpretation has been urged by another branch of the philosophical school in the past. Just as the religious interpretation of history is but a phase—a particular application—of the idealistic interpretation, the religious interpretation of jurisprudence and of legal history has found the key to juristic progress and to judicial institutions in the progress of religious thought and in religious institutions. The political interpretation is the one with which we are all familiar. It assumes that a movement from subjection to freedom, from status to contract, is the key to legal as well as to social development. It sees the end of all law in liberty and conceives of jurisprudence as the science of civil liberty. As Lorimer puts it, “the proximate object of jurisprudence, the object which it seeks as a separate science, is liberty.” This, too, is a phase of the idealistic interpretation and is urged by a branch of the philosophical school. It puts liberty where the recent philosophical school puts justice. But each looks to the development of an idea to explain the development of the law. Corresponding to the physical interpretation of history we have a biological or ethnological interpretation of jurisprudence and of legal history of which Post, in Germany, is the chief exponent. As Buckle looked to the physical environment of societies, Post looks to the ethnological environment of laws, and he finds in the characteristics of the races of man among whom laws exist the determining factors in juristic progress and in legal institutions. Finally we have an economic interpretation of jurisprudence and of legal history, of which, in this country Brooks Adams is the leading exponent. He asserts that the idea of justice has had nothing to do with the actual course of juristic speculation and legal development. He maintains that “the rules of the law,” to quote his own words, “are established by the self-interest of the

dominant class, so far as it can impose its will upon those who are weaker."

I should find it hard to choose among those several interpretations, if choice of one were necessary. But I do not believe it necessary. No institution is the product of any one cause. It is rather the resultant of many causes of which some observers will lay stress upon one and others upon another, but none of which may be left out of account. To take an example from biology: We used to be taught that each group and species were developed from some single prior group or species, and it was the task of the systematist to identify this ancestor and trace the development, and arrange his organisms accordingly. But today the biologist has a doctrine of polyphyletic. He recognizes that if one group or species may be represented by many groups or species which have developed therefrom, it is also true that a converging development of many groups or species may have given us what is one today. Hence, if some tell us that the spirit of our common law, the exaggerated individualism of our juristic thinking, is due to an innate tendency to individualism among Germanic peoples, kept down in some quarters by the weight of Roman learning, but never so repressed in England, while others see in it an outgrowth of the contests between the courts and the crown in the sixteenth and seventeenth centuries and a phase of the political development of that time, if some regard it as a product of Puritanism, an application of Puritan ideas in law and politics, reaching its highest development in America, that paradise of the Philistines, as Matthew Arnold has put it, while others see rather a result of economic thought and economic conditions in nineteenth-century America and of the frontier spirit surviving the frontier, I do not feel that I am obliged to make an absolute choice. In truth all of these are factors, and more than one has been a factor of great importance. Possibly one might refer Puritan theology and sixteenth and seventeenth-century politic thought to Teutonic individualism.

Kept back by Roman authority in law and in theology, the Teutonic genius burst its bonds at the Reformation, and the individual asserted himself in law, in politics in philosophy and in religion. One might say that there was something congenial to the Germanic spirit in Hebraism, which gave the Old Testament so profound an influence when our fathers began to read it. In that view, the Germanic character plus the economic conditions of the past century and the resultant economic theories would be our formula. But here again one has to reckon with the interaction of individualist character and religious doctrine and social conditions upon each other. There is little to be gained, therefore, by an attempt at profound generalization. We may say, at least, that Puritanism of itself and possibly because of the deeper-seated causes of which it was a manifestation, has been no unimportant factor in moulding the spirit of our common law.

Indeed there are special reasons for believing that Puritanism has been a controlling factor, and these reasons are my excuse, at a time when religious interpretations are not the fashion, for venturing a bit of religious interpretation of jurisprudence. For individualism, in and of itself, has not been peculiarly English or peculiarly American. What is peculiar to Anglo-American legal thinking, and above all to American legal thinking, is an ultra-individualism, an uncompromising insistence upon individual rights and individual property as the central point of jurisprudence. Other causes brought about a period of individualism in jurisprudence and in economics everywhere. It was Puritanism which gave that added emphasis to individualist ideas in the formative period of our American legal thought that has served to stamp them upon the science. Upon this hypothesis, the religious interpretation of our legal thought and legal history becomes no less important than the philosophical interpretation of Roman law through recognition of the great part played by the Stoic philosophy in its formative period.

We may recognize as the two main factors in the development of individualist thought in jurisprudence, the emancipation of the middle class and Protestantism. Berolzheimer has identified the former with the maturity and decay of the theory of natural law. But individualist natural law still flourishes in America. And if it be said that America has been par excellence the country of the middle class, we must note that the middle class has been dominant elsewhere and that Puritanism has given a peculiar character to the middle class of England and America. Even less may we attribute our common-law mode of thought solely to Protestantism. For one thing, its attitude toward the State is not distinctively Protestant. It has been said that "Luther's conception of the State and of duty to one's neighbor directly paved the way for that of Hegel." In politics, his principle was passive obedience. He assumed that the State was a chief good and that no individual rights could stand against it. Granting that it was the mission of the Reformation "to give life to individual freedom," individual freedom through the State and through society were quite as possible means of achieving this mission as the Anglo-American exaltation of individual freedom above the State and above society. In other words, a peculiar phase of the emancipation of the middle class and a peculiar phase of Protestantism must be taken account of in order to understand the spirit of our common law.

It is not an accident that the first reformer in English legal thought, was also the first reformer in English religious thought. John Wycliff is known for his resistance to authority in the church and his translation of the scriptures to bring them home to the common man. But in his tract *De Officio Regis* he attacked authority in law and asserted the sufficiency of English case law—for such it had fairly become—against the venerable legislation of Justinian and the sacred decretals of the Popes. Let us remember what this meant, according to the theories of that time.

Whatever the fact, the theory of the King's judges was that they administered the common custom of England, the customary modes of action of Englishmen in their relations with each other. The then theory as to the Roman law was that the *Corpus Juris Civilis*, as legislation of the Emperor Justinian, was binding upon peoples whose rulers regarded themselves also as the successors of Augustus. The theory as to the Canon law was that all jurisdiction was divided between the spiritual and the temporal, that in matters spiritual the temporal authority was wholly incompetent, and that the church, whose mouthpiece was the Pope, had an absolute legislative power within this field. "The Pope" says Boniface VIII in the fourteenth century, "holds all laws in his breast." Wycliff said boldly that men might well be saved "though many laws of the Pope had never been spoken." that Roman law was "heathen men's law," and that there was no more reason and justice in the civil law of Rome than in the civil law of England. He appealed from authority to the local custom of England, from the rules imposed externally by Roman law and the Pope to the rules which Englishmen made for themselves by their everyday conduct. But this was the same position which Wycliff took with respect to religion. In jurisprudence and in religion he appealed to the individual and for the individual against authority.

But the real influence of religious thinking was to come later. We have been told that for practical purposes the history of the common law begins in the latter part of the thirteenth century. I venture to think that for most purposes its history begins still later and that we shall not err greatly in beginning with the end of the sixteenth century. I speak here of the common law as a mode of juristic thought. Some dogmas, especially in the law of real property, have a longer history and our judicial institutions have to be studied from the time of Henry II. But our attitude toward legal problems, our modes of legal reasoning, the principles which make up the system of the com-

mon law have only to be studied from the reign of Elizabeth and have a continuous and consistent development from that time. For Anglo-American law, the periods of development begin with the age of Elizabeth and James I, with the American Revolution and with the Civil War.

The work of the English courts prior to Coke was summed up for us and handed down to us by that indefatigable scholar in what we have chosen to consider, an authoritative form; and we have looked at it through his spectacles ever since. Hence we may neglect the periods of growth prior to the age of Elizabeth and James I, since their results in our law today depend upon the way in which they appealed to the end of the sixteenth and beginning of the seventeenth centuries and the interpretation put on them by Coke. Again we may pass over the constructive work of the eighteenth century, for that work was done in Equity and the Law Merchant. Neither of these strictly are part of the common law, and so far from their affecting the spirit of the common law, the spirit of the common law affects them powerfully. But there are two growing periods of our common law system; two periods in which rules and doctrines were formative, in which our authorities have summed up the past for us and have given us principles for the future. These periods are (1) the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and (2) the period that some day, if we go on as we have been going, will be no less classical for us than the first—the period of legal development in America that came to an end with the Civil War. In the one the task was to go over the decisions and legislation of the past and make a system for the future. In the other, the task was to examine the whole body of English case-law with reference to what was applicable to the facts of life in America, and what not. Obviously the spirit of these times and of the men of these times, whose juristic labors gave us what we call the common law, could not fail to give color to the whole system.

But the age of Coke was the age of the Puritans in England, and the period that ends with our civil war was the age of the Puritans in America. We must not forget that the Puritan had his own way in America, that he was in the majority, had no powerful establishment to contend with, and made institutions to his own liking. For again it is not an accident that common-law principles have attained their highest and most complete logical development in America, and that we are and long have been more thoroughly a common-law country than England herself.

A fundamental proposition from which the Puritan proceeded was the doctrine that man was a free moral agent with power to choose what he would do and a responsibility coincident with that power. He put individual conscience and individual judgment in the first place. No authority could coerce them; but every one must assume and abide the consequences of the choice he was free to make. Applied to church polity, it led to a regime of "consociation but not subordination." "We are not over one another," said Robinson, "but with one another." Hence even church organization was a species of contract and a legal theory, a legalism, attached even to religion. If men were to be free to act according to their consciences and to contract with others for consociation in congregations, it was a necessary consequence that the State—as a political congregation—was a matter of contract also; and liberty of contract was a further necessary deduction. The early history of New England furnishes abundant applications of the idea that covenant or compact—the consent of every individual to the formation and to the continuance of the community—was the basis of all communities, political as well as religious. The precedent of the covenant which made Abraham and the children of Israel the people of God, furnished the religious basis for the doctrine. But it was applied to civil as well as ecclesiastical organization. Another consequence was to make a moral question of everything, and this meant to make it a legal question. For

moral principles in their essence are of individual and relative application. They depend upon circumstances and individuals. Hence if every question was treated as a moral question and moral questions were to be dealt with as concrete cases to be individualized in their solution, subordination of those whose cases were decided to those who had the power of weighing the circumstances of the concrete case and individualizing the principle to meet the case, might result. The idea of consociation demanded that a fixed, absolute, universal rule, which the individual had contracted to abide, be resorted to; and thus the moral and the legal principle were to be applied in the same way, and that the legal way. "Nowhere," says Morley, "has Puritanism done us more harm than in thus leading us to take all breadth and color and diversity and fine discrimination out of our judgments of men, reducing them to thin, narrow and superficial pronouncements upon the letter of their morality or the precise conformity of their opinions to accepted standards of truth." The good side of all this we know well. On the side of politics, the conception of the people not as a mass but as an aggregate of individuals, the precise ascription of rights to each of these individuals, the evolution of the legal rights of Englishmen into the natural rights of man, have their immediate origin in the religious phase of the Puritan Revolution. But on the side of law, it has given us the conception of liberty of contract, which is the bane of all labor legislation, the rooted objection to all power of equitable application of rules to concrete cases that has produced a decadence of equity in our State courts, the insistence upon and faith in the mere machinery of justice, which makes American legal procedure almost impossible of toleration in the business world of today, the notion of punishing the vicious will and the necessary connection between wrongdoing and retribution, which makes it so difficult for our criminal law to deal with anti-social actions and to adjust itself in its application to the exigencies of concrete criminality.

How does our Puritan individualism affect the actual administration of justice? We may best answer by turning to each of the great departments of the law and seeing the Puritan there at work. "The mission of the Reformation," says Berolzheimer, "was to give life to individual freedom." In this the Puritan is the incarnation of the Reformation. Individual freedom, individual rights were the basis of his religious, political and legal views. But individual freedom and individual rights are by no means all that legal systems have to look to, and our common law shows on every side the ill effects of taking these for the sole basis. For instance, few doctrines of the common law are more irritating today than the traditional attitude toward legislation, the judicial assumption that legislatures are in what Dicey calls the quiescent stage, the professional feeling that there ought to be little or no legislation on legal subjects, the attitude of resentment toward legislation on the part of bench and bar, that leads to the failure of codes and practice acts and makes so much of the labor of social workers nugatory after they have put it upon our statute books. The four last presidential addresses before the American Bar association have had for their subject the plethora of legislature-made laws. The late leader of the American bar died in the harness writing an elaborate argument against legislation, and made generous provision in his will for a professor in a leading American law school to teach—I had almost said to preach—the doctrine of no legislation. There is more than one reason for the common-law attitude towards legislation. But not the least is the attitude of the Puritan during the formative periods of our law. His reasons were primarily religious. It appeared to him, says Lord Acton, "that governments and institutions are made to pass away like things of earth, whilst souls are immortal; that there is no more proportion between liberty and power than between eternity and time; that, therefore, the sphere of enforced command ought to be restricted within fixed limits and that which had been

done by authority, and outward discipline and organized violence, should be attempted by division of power, and committed to the intellect and the conscience of free men."

Compare with this Mr. Carter's argument against legislation. "The true method of human discipline," he says, "is to leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct." Compare the holding in the New York Court of Appeals, in ruling adversely upon a statute as to hours of labor, that the maxim that the government governs best which governs least is proper for courts to bear in mind in expounding the constitution. Compare the narrow view of many of our courts as to what constitutes special or class legislation, a view that greatly limits effective law-making. For if we can only have laws of wide generality of application, we can have only a few laws, since the wider their application, the more likelihood there is of injustice in concrete cases.

In the law of torts, few doctrines are more irritating than those of assumption of risk and contributory negligence, as applied to injuries to employees. But these are eminently Puritan conceptions. The employee is a free agent. He chooses for himself. So choosing, he elects to work in a dangerous employment in which he runs a risk of being injured. He knows that others are to be employed with him; he knows that they may be negligent and that if they are, he may be injured. Knowing these things, he chooses freely to incur the risk. Very well; he is a free man, let him bear the loss. The master has done no wrong. The servant, to use Mr. Carter's language, must stand or fall by the consequences of his own conduct. It is not an accident that the classical exposition of this doctrine was penned in Massachusetts. Again, a workman, engaged constantly upon a machine, so that he comes to be a part of it and to operate mechanically himself, omits a precaution and is injured. The common law says to him "you are a free man, you have a mind and are capable of using it; you

chose freely to do a dangerous thing and were injured; you must abide the consequences.” As a matter of fact it may well be he did not and could not use his mind. It is said that statistics show the great majority of accidents happen in the last working hour of the day, when the mind is numbed and the operative has ceased to be the free agent which our law contemplates. But there is no escape from the legal theory. That very condition is a risk of the employment and is assumed by the laborer. Legislation is changing these rules, but the courts show a tendency to read the doctrine of contributory negligence into the statutes even where the legislature has plainly tried to get rid of it.

Out of many examples in Constitutional Law, we may notice the decisions as to the right to pursue a lawful calling and liberty of contract, which bear so grievously upon social legislation. Here it is significant that the prophet of a belated individualist crusade, the late Mr. Justice Field, had added to a Puritan ancestry and Puritan bringing up, profound study of the common law and practice of his profession on the frontier at a time and in a place where the individual counted for more and the law for less than has been usual even on the frontier. No doubt the latter circumstance had its influence. None the less the conception of individual rights exempt from social control to which his vigorous and learned opinions gave currency is essentially the Puritan conception of association. We are to be with one another but not above one another. The whole has no right of control over the individual beyond the minimum necessary to keep the peace. Everything else must be left to the free contract of a free man. Happily this idea passed its meridian in our constitutional law some years ago.

Again, in criminal law, one of the problems is the individualization of punishment, the adjusting of our penal system to the criminal rather than to the crime. Another is to get rid of the retributive theory, the revenge idea as a

basis of legal treatment of crime, which scholars agree is the bane of punitive justice. Still another is to make the criminal law an effective agency for repressing anti-social actions and protecting society. At each of these points our Puritan common law theories are fighting vigorous defense and slow retreat. It is not so long ago that a learned Supreme Court released a child from a reformatory on the ground that a reformatory was a prison, that commitment thereto was necessarily punishment for crime, and hence could only be warranted by criminal proceedings of a formal type, conducted with due regard to constitutional safeguards. The rise of Juvenile Courts has accustomed us to courts of criminal equity for the youthful offender; but attempts to introduce any system of individualization of punishment for the adult will have to wrestle a long time with constitutional difficulties. So too, the retributive theory is almost among the fundamental of our criminal law. We look upon the criminal in the abstract. He is a free moral agent, who, having a choice between right and wrong, voluntarily chose the wrong and must abide the penal consequences appointed in advance. Not only does this Puritanical view of the matter keep alive the retributive theory in jurisprudence, after kindred sciences have abandoned it, but it hampers the efficiency of penal legislation intended to protect society. The good sense of courts has introduced a doctrine of acting at one's peril with respect to statutory crimes which expresses the needs of society. Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals. Nevertheless all extension of this doctrine has been opposed sturdily by our text-writers, and to the Puritanism of Bishop and common-law orthodoxy of Judge McClain the decisions are anomalous and unsatisfactory.

In the law of property we may see conspicuous examples in the doctrine as to "abusive exercise of rights," as to

exercise of what otherwise would be a right for the sole purpose of injuring another, and in the older American doctrine with respect to surface water. Here again we may note that the typical exposition of the extreme individualist view as to rights of adjoining owners in disposing of surface water comes from Massachusetts. The influence of Roman law has done away with much of this. But the common law asked simply, was the defendant acting on his own land and committing no nuisance? If so, it cared nothing about his motive. If one were to put the argument of the French jurists, that use of property rights merely to injure another is anti-social and should be repressed, the common-law lawyer would doubtless reply in the language of one of his classical texts, "the public good is in nothing more essentially interested than in the protection of every individual's private rights."

Equity in America shows the same influence. The Puritan has always been a consistent and thorough-going opponent of equity. It runs counter to all his ideas. For one thing, it helps fools who have made bad bargains; and he objects to this, holding that fools should be allowed and required to act freely and then be held for the consequences of their folly. For another thing, it acts directly upon the person. It coerces the individual free will. It acts preventively, instead of permitting free action and imposing after the event the penalty contracted for in advance. For still another, it involves discretion in its application to concrete cases, and that in the Puritan view means superiority in the magistrate, in that it allows him to judge another by a personal standard instead of by an unyielding universal, legal rule. I need not remind you of the opposition to the Court of Chancery in England lasting almost to the eighteenth century, of the abolition of the Court of Chancery by Barebones' Parliament, nor of the reluctance of Massachusetts and Pennsylvania to grant equity powers to their courts. Pomeroy has remarked "the extreme reluctance of American courts to extend the jurisdiction of

equity, even where such extension consists solely in applying familiar principles to new conditions of fact." The gradual abandonment of equity powers and legalizing of equitable doctrines which I have ventured on another occasion to call a decadence of equity in America is no less remarkable. The methods and doctrines of equity have not been congenial to our tribunals, and if we remember that the latter have been manned with Puritans, the reason is obvious.

It is, however, in application and administration of the law that Puritanism has produced the most serious results. The Puritan's characteristic jealousy of the magistrate has taken an extreme form and has been developed in our legal procedure as a jealousy of the judge. "There is" says Bryce, "a hearty Puritanism in the view of human nature which prevades (the Constitution). It is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut." It is hardly too much to say that the Puritan ideal state was a permanent deadlock where the individual, instructed by a multitude of rules but not coerced, had free play of the dictates of his own reason and conscience. For our legislation exhibits an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he realized the intrinsic sinfulness of human nature. Accordingly we have abundance of rules and no adequate provision for carrying them out. Law paralyzes administration. Injunctions, actions of trespass, and mandamus proceedings hem in the executive officer on every side. But when the judicial department comes forward to execute laws, local juries and grand juries, local prosecuting officers, local sheriffs, are given power to hold up as well as to uphold the law and wield it as their individual consciences may dictate. Hence it is no less true that administration paralyzes law. The system of checks and balances produces a perfect balance. In practical result, the law too

often accomplishes little or nothing. We have abundance of law in the books and too often very little law in action.

This phase of the Puritan jealousy of the magistrate is even more conspicuous in American judicial procedure. In more than one state codes and practice acts aim to regulate every act of the judge from the time he enters the court room. It is hardly too much to say that the ideal judge is conceived of as a pure machine. Being a human machine and in consequence tainted with original sin, he must be allowed no scope for free action. Hard and fast rules of evidence and strict review of every detail of practice by a series of reviewing tribunals are necessary to keep him in check. In many states he may not charge the jury in any effective manner; he must rule upon and submit or reject written requests for academically stated propositions of abstract law; he must not commit any error which might possibly prejudice a party—whether in fact there is prejudice or not. Dunning has pointed out that the Puritan in America was able to carry into effect what in England could only be speculative opinions. Hence in America, in addition to the ritual of justice, belonging to a past age of formalism that put gold lace and red coats on the skirmish line, we have a machinery of justice devised to keep down the judicial personality which has made legal procedure in some sort an end in itself.

Many unhappy results flow from this over development of the machinery of judicial administration. But none is more serious than the disrespect for law to which it contributes powerfully. "I do not think I overstate the matter," says Brooks Adams, "when I say that this community lives very largely in defiance or in disregard of the law." And if we think he has put it too strongly, yet we must admit that the law of the land has not the vital hold upon the American people which law should have. We need not look about us to find examples of popular lawlessness. There is abundant matter for reflection nearer home. A few years ago, when I made a careful computation, I found

that ninety new trials a year were granted in actions against employers for personal injuries, reported in the National Reporter System, because the verdicts were not sustained by evidence, and that over forty new trials were granted annually in actions against railroad companies for personal injuries, reported in the same series, for the same reason. How many verdicts are set aside by trial courts in such cases annually for the same reason, we do not know. Nor is there means of knowing in how many more such cases the verdicts returned would not have been rendered, if the law had been zealously applied and enforced. For we have come to expect that in these cases the very machinery of the law will act lawlessly. Indeed there is a demand for this lawless justice, as statutes leaving questions of negligence wholly to juries, statutes introducing a theory of comparative negligence, with no legal standard, to be administered for each case by a jury, statutes forbidding judicial review of verdicts on the evidence, statutes forbidding judicial reduction of damages assessed by a jury, and statutes requiring jury trial for contempt of decrees abundantly witness. After all, what else do these statutes aim at than a legal getting away from law?

But all this does not show that we are intrinsically a lawless people. It means only that social justice is asserting itself against legal justice. It means that our legal system must temper its individualism. The courts cannot succeed in an attempt to force the modern world into a Puritan bed of Procrustes. If we recognize that it is not fundamental principles of jurisprudence, but traditional principles of Puritanism, operating out of their sphere, with which American legislatures are struggling, we may abate some of our hostility to legislation, and may be willing to allow collectivist principles, when the public desires them and the law-maker adopts them, to operate unchecked. We may be willing to concede something to the *vir bonus* upon the woolsack who would protect men from themselves. We may be willing to allow the magistrate some power of meet-

ing the exigencies of justice in concrete cases. We may be willing to trust a trial judge to use honestly and impartially the discretion without which trials will always be dilatory, expensive, and unsatisfactory. For it is always to be remembered that justice is made up of individual cases. If the judicial machinery does not produce speedy, inexpensive and just results in the actual causes that pass through it, no amount of mechanical or theoretical perfection will atone. Above all, we may be willing to relegate procedure to its proper place in the legal system.

At the battle of Balaclava the English pickets posted to warn their comrades of the approach of the enemy were surprised, and the attack of the Russian on the main body was in progress before the pickets were aware that an enemy was in the neighborhood. In commenting on this, a military historian says that the surprise resulted from the high degree of drill and discipline of the pickets, which had destroyed all initiative and had led them to believe that they had done their whole duty when they had conformed to the rules in which they had been trained while on guard in barracks and parade grounds. The historian adds that rules may deaden men's wits but can hardly sharpen them.

Some formulas are necessary in procedure to preserve the dignity of the tribunal, to expedite its business, to keep the person of the magistrate in due bounds, and to give to the judge the benefit of the experience of the past. But they are means, not ends. However much it may have suited the Puritan disposition to make them ends, in order to bring about a maximum of individual assertion and a minimum of magisterial action, it is against the genius of the time and the interest of the modern industrial community to continue in this attitude.

CAMBRIDGE, MASS.

ROSCOE POUND.

THE FOURTEENTH AMENDMENT AND THE NEGRO RACE QUESTION.

The presence of a large number of persons of African descent within our bounds—different in origin, temperament and physical appearance from the Teutonic Stock among whom they dwell—has ever been a serious problem in the life of our Republic. The organic law of the land has more than once felt the effect of this situation, a situation abnormal in a high degree. The influence of the negro on our constitutional development, though in a large measure negative, has been none the less potent. Constitutional Law in its very nature lies closest to the life of the people. It does not originate with the political doctrinaire. It has its roots deep in the social organism. It grows and changes as the people grow and change. And so in a society of mixed races, so widely different as Teuton and African, the organic law should be expected to express this peculiar condition of life which the forces of the past have bequeathed to us. But if under these circumstances it takes into account, not a condition of life, but a theory of life, we may expect to find the life of the people failing to conform to the constitutional ideal so expressed, no matter how noble and exalted such an ideal may be.

The relation of the negro race to the adoption and the interpretation of the Fourteenth Amendment to the Constitution of the United States is of profound historical and practical interest.

The Civil War had changed the legal status of the negro. The problem of readjustment to this new situation stared the country in the face. It presented a condition without a parallel in history. Under the presidential policy of reconstruction the South was gradually attempting to meet the new conditions. But Congress, under the lead of the radical wing of the Republican party, looked upon these

efforts with extreme disfavor, discredited the President, and took the entire responsibility for reconstruction into their own hands. They were led by the impractical idealist Sumner in the Senate and the partisan politician Stevens in the House. The South was excluded and had no voice in these deliberations. The Democrats of the North, in a hopeless minority, raised the voice of protest and warning, but without avail. It was the day of the radicals. In the heat of passion and in the fervor of partisan zeal they set to work to accomplish a task which might well have engaged the most sober deliberations of the wisest heads of any people.

In these times the negro question was predominant. It was the vital element in this reconstruction legislation. It was responsible for the anomalous situation in which the country found itself at the close of the War. From 1866 to 1876 the negro race question was the keynote of every political campaign. It was uppermost in the minds of the people. The fear that the South would oppress the freedmen was the political lash by which many a voter was beaten back into the party fold.

The Fourteenth Amendment was a part of this reconstruction program. It embodied the ideal of the radicals. It was adopted in 1868 by ultra-radical means. It was from first to last a party measure and was fought through as such with definite party aims in view.

Although the Amendment has five sections, we are here concerned with only the first and the last, which read as follows:

Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce,

by appropriate legislation, the provisions of this article."¹

There is here no mention of the negro as such, but it would be easy to establish from contemporaneous sources that this constitutional provision was primarily intended for the benefit of the negro race. On May 10, 1866, when the measure passed the House by a vote of 128 to 37, the applause in the galleries was loud and prolonged. "Mr. Eldridge of Wisconsin called upon the Speaker to put a stop to such proceedings. Jack Rogers hoped the colored brethren and sisters in the galleries would be allowed to wave their pocket handkerchiefs."² This may be regarded as one of the signs of the times. The congressional interpretation of the Amendment may be understood best by an examination of the legislation which was enacted under and by virtue of its adoption. Section five was intended to vitalize section one by giving Congress power to enact direct and positive laws for its enforcement. Pursuant to this ideal several measures were passed, the most drastic and comprehensive of which was the Civil Rights Act of 1875. The negro question was fundamentally related to this Act. It was an attempt to lift the negro up to a plane of equality with the whites and was the chief offspring of the Fourteenth Amendment.

There were many thoughtful men of that time who shared the popular belief that the Amendment had no wider mission than that of protecting the freedmen from the so-called "Black Codes" of the Southern States. Mr. Justice Miller, in delivering the opinion in the Slaughter House Cases, pronounced the following dictum: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."³ During the early period of the operation of the Amendment this dictum was adhered to by the majority of the Supreme Bench. It was

¹ Proclaimed to be in effect July 28, 1868.

² New York Herald, May 11, 1866.

Quoted by Flack, in "The Adoption of the Fourteenth Amendment."

³ 16 Wall. 81.

cited with approval and further elaborated in *Strauder vs. West Virginia*,⁴ in which the court said: "This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated * * * all the civil rights that the superior race enjoy." This was the view held also by the masses of the people in so far as they understood the measure.

Although this race situation may be said to have been the immediate or proximate cause of the adoption of the Amendment, as well as its immediate field of operation, in the mind of the radicals it had a much wider scope. To them it meant the ultimate centralization of power into the hands of the Federal Government. It meant the death knell of the doctrine of States' rights—the ultimate nationalization of all civil rights and the consequent abolition of State control over the private rights and duties of the individual. It meant the passing over of the police power of the State into the police power of the national government, thereby giving to Congress undefined and unlimited powers whereby it would be enabled to enter fields of legislation from which hitherto it had been barred.

These elements were not emphasized in the political campaigns from 1866 to 1868 which led up to the adoption of the Amendment. They were too intricate and subtle for the popular mind. They were, however, discerned by the leaders of the opposition, both in the North and in the South, and were combatted accordingly. It is sufficient, however, for our purpose to note that in the adoption and the attempted enforcement of the Amendment by Congress, the negro race question played a prominent and controlling part. It was to be, *par excellence*, the negro's charter of liberty.

It is now forty-three years since the adoption of the Amendment. It has been in operation long enough for us to see the actual function it has performed and can per-

⁴ 100 U. S. 306. See also *Ex parte Virginia*, 100 U. S. 344, and *Plessy v. Ferguson*, 163 U. S. 537.

form as a part of the Supreme Law of the Land. Has it followed the course marked out by its framers? What relation has its operation had to the life of the black man in our body politic? The answer to these questions may be found in the reports of the decisions of the Supreme Court of the United States. Under the genius of our government it is here that all such questions must come for final adjudication. That answer is written large and plain. Of the five hundred and seventy-five cases involving the Fourteenth Amendment in which the Supreme Court has delivered opinions since 1868, only twenty-seven deal with questions involving the negro race, that is to say, less than five per cent of the total litigation under the Amendment. The other five hundred and forty-three cases have to do with matters far removed from the race question. The Amendment has, in a way unforeseen by its framers, become gradually intertwined with the great economic problems which vex the country today. It is not the negro, but accumulated and organized capital which now looks to the Fourteenth Amendment for protection from State activity.

A closer study of these cases but emphasizes the remoteness of the Amendment from the actual life of the problems growing out of the mixed society of African and Teuton in the United States. These it now becomes our duty to examine in some detail.

Although the Amendment was adopted and proclaimed in July, 1868, the first litigation thereunder to reach the Supreme Court of the United States was decided April 14, 1873. These are known as the Slaughter House Cases.⁵ The negro question was not directly involved, but the decision proved of far-reaching consequence for that race. The chief constitutional point before the Court was the interpretation of that clause of the Amendment which reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

⁵ 16 Wall. 36.

the United States." The Court decided that under our system of government there were two species of citizenship, each with its privileges and immunities—a Federal citizenship and a State citizenship. To the former were attached only such privileges or immunities as were directly due to the nature of the Federal government and derived therefrom. All other privileges or immunities were inherent in State citizenship. The Court did not attempt to define either of these respective spheres, but it left the distinct impression that the privileges or immunities of citizens of the United States were rather few and unusual, while those attaching to State citizenship were directly related to the whole life, public and private, of the individual. In other words, the Court declared that this clause of the Amendment was not intended to interfere with the police power of the States. For the negro this means, in so far as this clause is concerned, that he must look to his State for protection rather than to the Federal government.

We shall now briefly outline in chronological order each of the cases specifically involving the negro race question.

OCTOBER TERM, 1875.

(1) *U. S. v. Cruikshank*.^{*}

Cruikshank and several other white men broke up by violent means a negro political meeting in Louisiana. They were arrested under Section Six of the Enforcement Act of May 30, 1870, tried and convicted in the Circuit Court of the United States for the District of Louisiana. On appeal to the Supreme Court they were acquitted on the ground that the Fourteenth Amendment did not justify such legislation by Congress. The citizen must not look to the Federal government for protection against the invasion of his rights by the private acts of others. Decision against Federal intervention.

OCTOBER TERM, 1879.

(1) *Strauder v. West Virginia*.[†]

Strauder, a negro, was indicted, tried and convicted for the crime of murder in a State court. All negroes were excluded from the grand and petit juries by West Virginia Statutes of 1872-73. The defendant contended that this was in conflict with U. S. Revised Statutes, Section 1977. This section embodied portions of the Enforcement Act of 1870 and the

^{*} 92 U. S. 542.

[†] 100 U. S. 303.

Civil Rights Act of 1875. Upon proceedings in the United States Supreme Court the State court was reversed and the West Virginia Act of 1872-73 declared unconstitutional. Field and Clifford, JJ., dissented. Decision in favor of Federal intervention.

(3) *Virginia v. Reeves*.^{*}

Two negro men were indicted for the murder of a white man and tried in a State court before a jury composed only of white men. Defendants moved for a modification of the venire so as to allow one-third of the same to be composed of negroes. This motion was denied. Defendants then petitioned for a removal to the United States Circuit Court under the Civil Rights Act of 1875. This petition was also denied. Thereupon they were tried and convicted. A petition in the United States Circuit Court for the writ of *habeas corpus* was allowed and the case docketed therein. The Commonwealth of Virginia then petitioned the Supreme Court of the United States for a writ of mandamus to compel the return of the prisoners to the custody of the State. The petition was granted on the ground that the defendants could not as a matter of right demand a mixed jury; the court declaring that the Fourteenth Amendment is not violated if, when the jury is all white, it cannot be shown that negroes were excluded solely on the ground of race or color. Decision against Federal intervention.

(4) *Ex parte Virginia*.[†]

J. D. Coles, Esq., Judge of the County Court of Pittsylvania County, Virginia, was arrested by Federal indictment in the District Court of the United States for the Western District of Virginia for failing to select negroes as grand and petit jurors to serve in the county courts of the above mentioned county. This arrest was made under Section Four of the Civil Rights Act of 1875. Petitions to the Supreme Court of the United States for the writ of *habeas corpus* were filed by both Coles and the Commonwealth of Virginia. These petitions were denied and the cause remanded to the District Court for trial.

Field and Clifford, JJ., dissented. The merits of the case, that is as to whether Judge Coles was guilty of discrimination against negroes in the selection of jurymen, solely on the ground of race or color, were not involved in these proceedings. The decision went only so far as to declare Section Four of the Civil Rights Act of 1875 constitutional. Decision in favor of Federal intervention.

OCTOBER TERM, 1880.

(5) *Neal v. Delaware*.[‡]

The defendant, a negro, was indicted and arraigned for trial in a Delaware State court for the crime of rape upon a white woman. The Delaware Constitution of 1831, Section One, Article Four, and the Delaware Revised Statutes of 1853, Section 109, thereunder enacted, limited the selection of grand and petit jurors to the white race. On the ground of

* 100 U. S. 313.

† 100 U. S. 339.

‡ 103 U. S. 370.

this discrimination the defendant moved to quash the indictment. This motion was denied. The defendant was thereupon tried and convicted and sentenced to be hanged. Upon a writ of error to the Delaware court the United States Supreme Court declared the law under which the juries had been drawn for the trial of the case, to be in violation of the Fourteenth Amendment and ordered the release of the prisoner. Waite, C. J., and Field, J., dissented. Decision in favor of Federal intervention.

OCTOBER TERM, 1882.

(6) *Pace v. Alabama*.¹¹

The defendant was tried and convicted in a State court of Alabama under Section 4189 of the Code of Alabama, which provided for a severer punishment in cases of fornication and adultery between negroes and whites than between members of the same race. Upon writ of error, the United States Supreme Court declared that this was not a denial of the equal protection of the laws under the Fourteenth Amendment. Decision against Federal intervention.

(7) *Bush v. Kentucky*.¹²

The defendant, a negro, was indicted for murder and arraigned for trial under II Revised Statutes of Kentucky of 1852, p. 75, which excluded negroes from all jury service. A motion to set aside the panel of petit jurors on the ground of discrimination was overruled. Petition for removal to the United States Circuit Court was also denied. The defendant was thereupon tried, convicted and sentenced to death. Upon writ of error, the United States Supreme Court declared the indictment void as the law under which it was found violated the equal protection clause of the Fourteenth Amendment. Decision in favor of Federal intervention.

OCTOBER TERM, 1883.

(8) *The Civil Rights Cases*.¹³

These were five separate causes of action, each involving the same Federal question, namely, the constitutionality of Sections One and Two of the Civil Rights Act of 1875. They were thus treated as one case by the United States Supreme Court. The facts may be briefly summarized as follows:

(1) The denial of hotel accommodations to certain negroes in the State of Kansas.

(2) The denial of hotel accommodations to a negro in the State of Missouri.

(3) The denial to a negro of a seat in the dress circle of Maguire's Theater in San Francisco.

(4) The denial to a person (presumably a negro) the "full enjoyment" of the accommodations of the Grand Opera House in New York City.

(5) The refusal by a conductor on a passenger train to allow a negro

¹¹ 107 U. S. 110.¹² 109 U. S. 3.¹³ 106 U. S. 583.

woman to travel in the "ladies' car" of a train on the Memphis and Charleston Railroad Company.

These acts of discrimination by private persons were severally set up as violations of Sections One and Two of the Civil Rights Act, which, by its terms, protected the negro from the invasion of his newly given rights by the acts of private individuals as well as by action of the States. The primary question in the case was the constitutionality of this act of Congress. A further interpretation of the Thirteenth Amendment was also involved. In making the decision the court but elaborated the doctrine foreshadowed in the *Slaughter House Cases*¹¹ and formulated in *United States v. Cruikshank*,¹² and in *Virginia v. Reeves*,¹³ that Congress had no power under the Fourteenth Amendment to initiate direct and affirmative legislation and thus invade and destroy the police power of the States. It could only enact general laws which would regulate the enforcement of the prohibitions contained in the Amendment when they were violated by the States. It is powerless to establish a Federal Code regulating or controlling the acts of private persons in the States. Harlan, J., dissented. Decision against Federal intervention.

OCTOBER TERM, 1889.

(9) *Beatty v. Benton*.¹⁴

In 1854 a negro named Carrie transferred by deed a lot in Augusta, Georgia, to a white man. Under a statute of 1818-19, negroes could not hold real property in Georgia. Litigation over this property began in 1879 in the State courts, the outcome of which was the declaration that the deed of Carrie was void by virtue of said antebellum statute. The aggrieved party attempted to set up the Federal question that this was in contravention of the equal protection clause of the Fourteenth Amendment. Upon writ of error the United States Supreme Court decided that no Federal question was presented, and dismissed the writ. Decision against Federal intervention.

OCTOBER TERM, 1894.

(10) *Andrews v. Swartz*.¹⁵

Andrews, a negro, was indicted, tried and convicted in a New Jersey State court for murder, and sentenced to death. He then petitioned the United States Circuit Court for a writ of *habeas corpus* on the ground that negroes had been excluded from the grand and petit juries which dealt with his case. The Circuit Court denied the petition. On appeal the Supreme Court declared that the petitioner had used the wrong method of procedure, since the regular trial of a State court cannot be reviewed by *habeas corpus* proceedings. Decision against Federal intervention.

¹¹ 16 Wall. 36.

¹² 92 U. S. 542.

¹³ 100 U. S. 313.

¹⁴ 135 U. S. 244.

¹⁵ 156 U. S. 272.

OCTOBER TERM, 1895.

(11) *Gibson v. Mississippi.*¹⁹

The defendant, a negro, was indicted for murder and arraigned in a State court. He petitioned for the removal of the cause to the Federal Court on the ground that negroes were excluded from the grand and petit juries. The petition was denied and the defendant forthwith tried and convicted. The ruling of the State court was upheld by the United States Supreme Court on writ of error. No proof was offered of discrimination against negroes "solely on the ground of race or color." Decision against Federal intervention.

(12) *Charley Smith v. Mississippi.*²⁰

The defendant, a negro, was indicted for murder and arraigned in a State court for trial. He moved to quash the indictment on the ground that negroes were excluded from the grand and petit juries. No proof of discrimination was offered. The motion was overruled and the defendant tried and convicted. Upon writ of error the United States Supreme Court affirmed the decision. Decision against Federal intervention.

(13) *Murray v. Louisiana.*²¹

The defendant, a negro, was indicted, tried and convicted of murder by white juries. The same procedure was had as in the foregoing case. Decision against Federal intervention.

(14) *Plessy v. Ferguson.*²²

Plessy, a person of African descent, was arrested, tried and convicted in the Criminal District Court for the Parish of New Orleans for violating the Louisiana statute of 1890 (No. 111, p. 152), which provided that negroes and white persons should travel in separate compartments on the passenger trains in that State. Upon proceedings had in the United States Supreme Court by way of *prohibition* and *certiorari* to test the constitutionality of said statute, it was held to be a valid exercise of the police power of the State, and therefore not in violation of the equal protection clause of the Fourteenth Amendment. Harlan, J., dissented. Decision against Federal intervention.

OCTOBER TERM, 1897.

(15) *Williams v. Mississippi.*²³

The defendant, a negro, was indicted for the crime of murder, and arraigned before juries composed entirely of white men. A motion to quash the indictment on the ground of race discrimination was overruled. A petition for removal to the United States Circuit Court for the same alleged reason was denied. No proof of such discrimination was offered. The defendant was thereupon tried, convicted and sentenced to death.

¹⁹ 162 U. S. 565.²⁰ 162 U. S. 592.²¹ 163 U. S. 101.²² 163 U. S. 537.²³ 170 U. S. 213.

Upon writ of error the United States Supreme Court affirmed the decision. Decision against Federal intervention.

OCTOBER TERM, 1899.

(16) *Cummings v. Board of Education.*²⁴

The Ware High School of Richmond County, Georgia, a public institution for negroes only, was suspended "for economic reasons," while the high school for whites in the same county was continued in operation. Cummings, a negro taxpayer, complained of discrimination against the negroes as being in violation of the "privileges and immunities" and the "equal protection" clauses of the Fourteenth Amendment. The trial did not show any abuse of discretion allowed by law to the county Board of Education. The constitutionality of all laws providing separate accommodations for whites and blacks in the public schools of the State was attacked in the argument of counsel, but the question was not presented in the record. Upon writ of error the United States Supreme Court affirmed the decision of the Supreme Court of Georgia upholding the action of the county Board of Education. Decision against Federal intervention.

(17) *Carter v. Texas.*²⁵

The defendant, a negro, was indicted and arraigned in a State court for trial for the crime of murder. He moved to quash the indictment on the ground that negroes were excluded from the grand jury on account of their race or color. He offered to introduce proof in support of this motion. The court refused to allow the introduction of proof and overruled the motion. The defendant was forthwith tried and convicted. Upon writ of error the United States Supreme Court reversed the decision of the State court and remanded the case on the ground that the trial court erred in refusing to receive proof in support of said motion. Decision in favor of Federal intervention.

OCTOBER TERM, 1902.

(18) *Tarrance v. Florida.*²⁶

The defendant, a negro, was indicted and arraigned for trial for the crime of murder. The juries were composed entirely of white men. He moved to quash the indictment on the ground of racial discrimination. No proof was offered in support of the motion. He was forthwith tried and convicted. Upon writ of error the United States Supreme Court affirmed the decision of the State court. Decision against Federal intervention.

(19) *Brownfield v. South Carolina.*²⁷

The defendant, a negro, was indicted for the crime of murder before a grand jury composed entirely of white men. He moved to quash the

²⁴ 175 U. S. 528.

²⁵ 177 U. S. 442.

²⁶ 188 U. S. 519.

²⁷ 189 U. S. 426.

indictment because of an alleged exclusion of negroes therefrom on account of their race or color. The motion further set up that the negroes constituted four-fifths of the population of the county. No proof of discrimination was offered. The defendant was tried and convicted and the proceedings of the State court were affirmed, upon writ of error, by the United States Supreme Court. Decision against Federal intervention.

(20) *Giles v. Harris.*²⁰

Giles, a negro, instituted proceedings to test the constitutionality of the suffrage clauses of the Constitution of Alabama of 1901. The interpretation of the Fifteenth Amendment was the paramount issue, although the "equal protection" clause of the Fourteenth Amendment was involved. An adverse decision was given in the State courts. The defendant prosecuted a writ of error to the Supreme Court of Alabama, which was dismissed for want of jurisdiction by the United States Supreme Court. The record did not present a Federal question. Brewer, Brown and Harlan, JJ., dissented. Decision against Federal intervention.

OCTOBER TERM, 1903.

(21) *Rogers v. Alabama.*²¹

The defendant, a negro, was indicted and arraigned for the crime of murder. The juries were composed entirely of white men. He moved to quash the indictment on the ground that negroes were excluded from the juries on account of their race or color. The motion was stricken from the files for prolixity and the defendant tried and convicted. Upon writ of error the United States Supreme Court decided that the motion was relevant, properly presented a Federal question, and, though perhaps including some superfluous matter, should not have been stricken from the files on the ground of local practice. Proof should have been allowed to have been introduced under the motion. The State court was reversed and the cause remanded. Decision in favor of Federal intervention.

(22) *Giles v. Teasley.*²²

This was a second attempt by Giles, a negro, to test the constitutionality of the suffrage clauses of the Constitution of Alabama of 1901. The Fifteenth Amendment, as before, was predominantly involved, the Fourteenth being only of secondary importance. The case was decided adversely in the State courts. Upon writ of error the United States Supreme Court dismissed the proceedings on the ground that the record did not present a Federal question. The pleadings of the plaintiff were inconsistent, one allegation neutralizing the other. Harlan, J., dissented. Decision against Federal intervention.

OCTOBER TERM, 1905.

(23) *Martin v. Texas.*²³

The defendant, a negro, was indicted for the crime of murder and arraigned for trial. He moved to quash the indictment on the ground that

²⁰ 189 U. S. 475.

²¹ 192 U. S. 226.

²² 193 U. S. 146.

²³ 200 U. S. 316.

all negroes had been excluded from the grand and petit juries because of race or color. No proof of discrimination was offered. The motion was overruled and the defendant tried, convicted and sentenced to death. The United States Supreme Court, upon writ of error, reiterated its former opinions that the defendant could not, as a matter of right, demand a mixed jury. Decision against Federal intervention.

OCTOBER TERM, 1906.

(24) *Hodges v. United States.*²²

Hodges and several other white men were indicted by a grand jury in the District Court of the United States for the Eastern District of Arkansas on the charge of threatening and intimidating eight negro laborers in a certain lumber yard. The indictment was found under U. S. Revised Stat. Sec. 1977-9, 5508 and 5510, which embodied portions of the Civil Rights Act of 1866, the Enforcement Act of 1870, the Ku Klux Act of 1871, and the Civil Rights Act of 1875. The interpretation of all three of the War Amendments was involved, the Thirteenth being predominant. The defendants demurred to the indictment as presenting no Federal question. This was overruled and the defendants forthwith tried and convicted. Upon writ of error the Supreme Court reversed the District Court and remanded the cause with instructions to sustain the demurrer. The alleged offence having been committed by private persons was not within the jurisdiction of a Federal court. Harlan and Day, JJ., dissented. Decision against Federal intervention.

OCTOBER TERM, 1908.

(25) *Berea College v. Kentucky.*²³

Berea College, a Kentucky corporation, was indicted under Section One of the Acts of Kentucky of 1904, Chap. 85, which provided that no person or corporation should operate any school or college in which persons of the white and the negro races were both received as pupils. The facts were undisputed, Berea College being such a mixed school. The only point in the case was the constitutionality of the above mentioned law under the Fourteenth Amendment. The trial in the State court resulted in a conviction and fine. Upon being brought to the United States Supreme Court by writ of error, the case turned upon the point that the defendant was a corporation and not a person, and hence being a creature of the State was subject to its control in this particular. The question as to the power of the State to enforce the separation of the races in schools *per se* was not decided. Only that portion of the Act which referred to the restrictions on corporations was declared constitutional. The Supreme Court—like other forces—follows the line of least resistance. If a case be disposed of on a lesser point, the greater will not be decided. One cannot but admire the logic and ultimate justice of such a rule. Harlan, J., dissented. Decision against Federal intervention.

²² 203 U. S. 81.

²³ 211 U. S. 45.

(26) *Thomas v. Texas.*²⁴

The defendant, a negro, was indicted and arraigned on the charge of murder. He moved to quash the indictment on the ground that all negroes had been excluded from the grand and petit juries. No proof of discrimination was offered. The motion was overruled and the defendant tried, convicted and sentenced to death. Upon writ of error the United States Supreme Court affirmed the decision of the State court on the ground aforementioned that discrimination will not be presumed. Decision against Federal intervention.

OCTOBER TERM, 1909.

(27) *Marbles v. Creecy.*²⁵

A requisition was issued by the Governor of Mississippi to the Governor of Missouri for the return of Marbles, a negro, who was charged with the crime of assault with intent to murder. He had fled to the State of Missouri. Upon being arrested in the latter State, by virtue of said requisition, he petitioned for a writ of *habeas corpus* in the United States Circuit Court, setting up the alleged fact that it was not possible that he could receive a fair trial should he be returned to the State of Mississippi, on account of his race or color. No proof was offered that such a state of affairs would come to pass. The petition was denied by the Circuit Court. Upon appeal to the United States Supreme Court the decision was affirmed and the prisoner ordered to be surrendered. Decision against Federal intervention.

We may now consider what phases of the negro race question have become related to the operation of the Fourteenth Amendment since its adoption in 1868. In so doing it is well to bear in mind two facts: First, that the negro race has increased in numbers during the last forty years from nearly five²⁶ to about ten millions and that the social complexity of the Afro-Teutonic situation has become intensified rather than diminished. Second, that litigation under the Fourteenth Amendment has steadily increased until within recent years it has engaged the attention of the United States Court more than has any other part of the Constitution, with the possible exception of the Interstate Commerce clause.

An analysis of the foregoing data reveals the fact that the negro race question has been presented to the Supreme Court under this Amendment in only eight different as-

²⁴ 212 U. S. 278.²⁵ 215 U. S. 63.²⁶ The negro population by the census of 1870 was 4,880,009.

pects, of varying degrees of importance: They may be stated as follows:

(1) The power of Congress to initiate under the Amendment direct and positive legislation in behalf of the negro as such. This had been attempted under the Enforcement Act of May 30, 1870, the Ku Klux Act of April 20, 1871, and the Civil Rights Act of Feb. 27, 1875. This point was three times presented to the Supreme Court; once in 1875,³⁷ once in 1883³⁸ and once as late as 1906.³⁹

(2) The validity of a deed executed by a negro in Georgia in 1854, when by virtue of a Georgia statute of 1818-19 negroes could not hold real property in that State. No federal question was presented.⁴⁰

(3) Habeas corpus proceedings to prevent the return by extradition of a negro from the State of Missouri to the State of Mississippi on the ground of probable race discrimination at the forthcoming trial in the latter State.⁴¹

(4) Two unsuccessful attacks by the same party on the suffrage clauses of the Constitution of Alabama of 1901. The Fifteenth Amendment was the predominant issue.⁴²

(5) The power of a State to impose a severer penalty in the case of adultery between negroes and whites than for the same crime between members of the same race.⁴³ Code of Alabama, 1880, Sec. 4189.

(6) The power of a State to require negroes and whites to travel in separate coaches or compartments on passenger trains.⁴⁴ Louisiana Stat. 1890, No. 111, popularly known as the Jim Crow Law.

(7) The color line in education. This has been presented to the Court in two aspects, namely: The power of a State, through the discretionary authority of its county officials, to suspend a negro high school while continuing

³⁷ United States v. Cruikshank, 92 U. S. 542.

³⁸ The Civil Rights Cases, 109 U. S. 3.

³⁹ Hodges v. United States, 203 U. S. 1.

⁴⁰ Beatty v. Benton, 135 U. S. 244.

⁴¹ Marbles v. Creedy, 215 U. S. 63.

⁴² Giles v. Harris, 189 U. S. 475; Giles v. Teasley, 193 U. S. 146.

⁴³ Pace v. Alabama, 106 U. S. 583.

⁴⁴ Plessy v. Ferguson, 163 U. S. 537.

to operate the high school for whites.⁴⁵ Secondly, the power of a State to penalize an incorporated college for operating an institution in which both white and black pupils were received.⁴⁶

(8) The exclusion of negroes from the grand and petit juries in the State courts. This phase of the question has been presented to the Supreme Court sixteen times.⁴⁷ In fourteen of these the defendant had been convicted of murder and in one of rape.

These eight groups of cases under the Fourteenth Amendment are clearly of unequal importance and bear different relations to the actual problem incident to the presence of the negro race in our midst. The cases of the first group are now only of historical interest and bear no relation to the present situation. That avenue of activity under the Amendment has long been closed. The second and third groups containing one case each may be regarded as frivolous attempts at Federal intervention and may also be dismissed from consideration so far as the modern problem is concerned. Group four gains significance chiefly in relation to an alleged violation of the Fifteenth Amendment.

The remaining four groups come nearer to the real life of the races and express something of the conditions confronting them, involving as they do the following problems: Penalizing crime between the two races more heavily than between members of the same race; the color line in education; the Jim Crow Law; and the excluding of ne-

⁴⁵ *Cummings v. Board of Education*, 175 U. S. 528.

⁴⁶ *Berea College v. Kentucky*, 211 U. S. 45.

⁴⁷ *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Virginia v. Reeves*, 100 U. S. 313 (1879); *ex parte Virginia*, 100 U. S. 339 (1879); *Neal v. Delaware*, 103 U. S. 370 (1880); *Bush v. Kentucky*, 107 U. S. 110 (1882); *Andrews v. Swartz*, 156 U. S. 212 (1894); *Murray v. Louisiana*, 163 U. S. 101 (1895); *Gibson v. Mis-*

issippi, 162 U. S. 565 (1895); *Charley Smith v. Mississippi*, 162 U. S. 592 (1895); *Williams v. Mississippi*, 170 U. S. 213 (1897); *Carter v. Texas*, 177 U. S. 442 (1899); *Tarrance v. Florida*, 188 U. S. 519 (1902); *Brownfield v. South Carolina*, 189 U. S. 426 (1902); *Rogers v. Alabama*, 192 U. S. 226 (1903); *Martin v. Texas*, 200 U. S. 316 (1905); *Thomas v. Texas*, 212 U. S. 278 (1908).

groes from jury service. The chief phase of the Amendment which these questions involve is the clause which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

What may we say then has been the effect of the operation of the Amendment upon that race chiefly for whose benefit it was adopted? What has been its relationship to the Federal Government, what restraint has been placed upon the States, and lastly, what has it accomplished in positive results for the negro race?

As we have seen, the idea was quite prevalent at the time of the adoption of the Amendment, that its chief field of operation would be effective by virtue of direct, positive and primary legislation by Congress in behalf of the negro race. In pursuance of this constitutional ideal Congress began to legislate in this direction. The United States Supreme Court at an early stage of the operation of the Amendment declared all such legislation unconstitutional and beyond the power of the Federal government. As a consequence the relationship of Congress to the Amendment has been for a long time clearly understood. It may be summed up as follows: The first section of the Amendment is a prohibitory measure and the prohibitions therein expressed operate against the States only. They bear no relationship to the acts of private persons within the States. Section five goes only so far as to give Congress the power by general legislation to enforce these prohibitions. Congress may, within bounds, provide the modes of redress when a State has violated the prohibitions. Congress cannot enforce them against the States. The State must take the initiative in violating the Amendment; then and then only can the aggrieved party seek redress. And this not by an appeal to national laws, but by the complex, uncertain and tortuous path through the courts of his State to the Supreme Court of the United States. Congress is limited to the matter of regulating the time, manner and occasion of this appeal to Federal

authority for intervention. We see, therefore, that so far as the negro question is related to the Amendment, Congress may be eliminated as a vital factor. The Supreme Court is the only branch of the Federal Government which is competent to deal with the question, and that under conditions which render the Federal Government a minimum force in the practical solution of the negro race problem. So far as the Fourteenth Amendment is concerned the Federal Government would be powerless to prevent armed mobs of whites from driving negroes out from a State, or otherwise threatening or intimidating them in their attempt to exercise the privileges of citizenship.

We next turn to consider in what manner and to what extent has the Supreme Court sustained or rejected petitions for Federal intervention in behalf of the negro race under the operation of the Amendment. As has been shown there were twenty-seven such appeals to Federal authority. Twenty-one of these were decided adversely to the party aggrieved. The remaining six were decided in favor of Federal intervention to a limited extent.

The police power of a State to deal with the race question has been squarely before the Supreme Court only four times within the past forty years. One of these deals with the relation of the negro to the jury system. This we shall consider later. The definite results of the other three decisions involve only two principles, to-wit: (1) A State has the power to inflict a severer punishment for the crime of adultery and fornication between negroes and whites than it inflicts for the same crime between members of the same race.⁴⁸ This involves the important principle of making distinctions in law on the ground of race or color. It violates no clause of the Fourteenth Amendment. To what extent this principle may be applied to the present situation has yet to appear. (2) A State has the power to separate the races one from the other in its school systems and on the passenger trains passing through its territory.

⁴⁸ *Pace v. Alabama*, 106 U. S. 583.

As to the first, that of maintaining separate schools for black and white, the question as such has never been clearly before the Supreme Court and has, therefore, never been decided absolutely. In *Cummings vs. Board of Education*⁴⁹ the question was discussed, but the record necessitated only that the Court decide that a State may, under certain circumstances, suspend temporarily a negro high school while continuing to operate the white high school in the same locality. In rendering the opinion of the Court, however, Mr. Justice Harlan pronounced the following dictum: "The education of the people in schools maintained by State taxation is a matter belonging to the respective States and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined."

In *Berea College vs Kentucky*⁵⁰ the question was fairly presented, but the case turned on the point that Berea College was a corporation created by the laws of Kentucky and therefore subject to the exercise of the police power of that State.

This principle of separation of African and Teuton on racial grounds is the same whether it be the maintaining of separate schools, separate churches, separate hotels, separate compartments in public conveyances, segregation in certain quarters—residential or business—of towns and cities, in the park and playground systems of the larger cities, in the theaters and other places of public amusement, in fine, the separation of the races at all times, in all places, and under all circumstances where they would in large numbers come into physical contact the one with the other.

In the case of *Plessy vs. Ferguson*⁵¹ this principle was for the first and only time properly presented to the Supreme Court of the United States for adjudication under

⁴⁹ 175 U. S. 528.

⁵⁰ 211 U. S. 45.

⁵¹ 163 U. S. 537 (Louisiana).

the Fourteenth Amendment. As we have seen the Court decided that a State has the power to require the separation of the negroes and the whites from each other on the ground of race or color in the matter of riding on passenger trains. But in rendering the majority opinion, Mr. Justice Brown further elaborated this principle of race separation, using among others the following expressions: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation * * * If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."⁵² The learned Justice here struck at the root of the matter. He tacitly recognized two elements in the problem of extreme interest—the futility of the early Congressional ideal of the scope and of the efficiency of the Amendment; and the "difficulties of the present situation."

In the same opinion, after reviewing the decision in the Slaughter House Cases, he speaks as follows: "The object of the Amendment was undoubtedly to enforce the absolute equality of the races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or the commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power—even by courts

⁵² *Ibid.* p. 544.

of States where the political rights of the colored race have been longest and most earnestly enforced."⁵³ Here the learned Justice cites several cases from various States of the Union and quotes from one Massachusetts case *in extenso*.⁵⁴

This decision has been quoted at some length because it is the only instance of the Supreme Court having passed upon this vital question, and settled, it seems, once for all the principle of race separation in its relationship to the Fourteenth Amendment. The opinion enunciates sound principles of political science and is justified by the logic of history and of fact.

There seems to be no limit to which a State may go in requiring the separation of the races. May it not do on a larger what it can do on a smaller scale? So long as the law operated equally on both races, could Federal intervention under the Fourteenth Amendment be invoked by either? The situation is a strange one in a government dedicated to the most exalted ideals of democracy. It is none the less inevitable, and the operation of this principle of race separation may yet prove the means of a solution of this problem with the least injustice to white or black.

It has been in reference to the right of negroes to sit on juries in the State courts that the authority of the State has been most seriously questioned. On this point alone the Federal Government has intervened in behalf of the negro race and restrained, in some measure, the action of the States. Of the sixteen cases before the Supreme Court on this question, six were decided adversely to the States involved. The sum of these decisions may be stated in a very few principles, namely:

(1) No State can make any law which *prima facie* excludes negroes from jury service because they are negroes.

⁵³ *Ibid.* p. 544.

⁵⁴ *Roberts v. City of Boston*, 5 Cush. 198. Separate schools for negroes and whites were maintained in

Boston. The plaintiff, through his counsel, Mr. Chas. Sumner, attacked the validity of the law. The Court decided against plaintiff.

Such a law would be clearly in violation of the Amendment. Only one such law has been called in question as having been enacted since July 28, 1868, the date of the adoption of the Amendment, viz.: West Virginia Acts, 1872-3, p. 102, which limited jury service to white men.⁵⁵ On two other occasions surviving antebellum laws excluding negroes from jury service, have been declared unconstitutional, to-wit: Sec. One, Article Four, of the Delaware Constitution of 1831,⁵⁶ and Revised Statutes of Kentucky of 1852 (pp. 75, 77).⁵⁷ It may be of interest to notice that these three cases did not come from former seceding States.

(2) No State may, through its executive, administrative or judicial officers, exclude from jury service persons of African descent "solely on the ground of race or color." Three times here also the Supreme Court has intervened in behalf of the negroes. Once in 1879 when a county judge in Virginia was accused of making such discrimination.⁵⁸ This was, however, a proceeding by way of *habeas corpus* and the merits of the alleged discrimination were not decided. In the other two instances of Federal intervention, once in 1899⁵⁹ and once in 1903,⁶⁰ the State courts were reversed on the ground that the trial court erred in refusing to receive proof of the alleged racial discrimination under a motion to quash the indictment for that reason. In other words, these three adverse decisions involved only the technicalities of legal procedure. In none of these sixteen attempts to force the States to summon negroes for jury service was there any proof of discrimination had in open court.

One other thing must be borne in mind. These cases represent no movement on the part of the negro race to obtain places on white juries. They stretch over a period of forty years. They bear no relationship to the ideals of

⁵⁵ *Strauder v. West Virginia*, 100 U. S. 303.

⁵⁶ *Neal v. Delaware*, 103 U. S. 370.

⁵⁷ *Bush v. Kentucky*, 107 U. S. 110.

⁵⁸ *Ex parte Virginia*, 100 U. S. 339.

⁵⁹ *Carter v. Texas*, 177 U. S. 442.

⁶⁰ *Rogers v. Alabama*, 192 U. S. 226.

the better element of the negro race. They come chiefly from the lower South, where there are practically no negro lawyers. These appeals to the Federal government are the work of white attorneys, representing, through appointment or choice, poor and ignorant negro criminals already convicted before State tribunals of the darkest crimes known to man. It is the grasp of the drowning man after a straw, since the invocation of the Fourteenth Amendment in the Supreme Court of the United States means that the day of execution will be delayed.

What then is the situation today in reference to this question of jury service? The principle which has been evolved out of these attempts to invoke the aid of the Federal Government under the Fourteenth Amendment may be stated negatively as follows: Where there is no discrimination in the laws of the State against negroes on the ground of race or color and where the jurors of said State are customarily all white men, discrimination against such negroes, *solely on the ground of race or color*, will not be presumed, but must be substantiated by positive proof by the party aggrieved. The Amendment can give no further guarantee than this. The effect of the operation of this principle is that practically no negroes are chosen for jury service, especially in those States where they are present in large numbers.

Since the State may exclude negroes on any ground except that of race or color, it is practically impossible for a negro to prove on what ground he has been excluded. Even though the race element entered into the motive for exclusion and formed the dominant element thereof, the discrimination would be legal under the decisions of the Supreme Court. Should we, for example, even suppose that negroes were excluded from jury service solely because of their race or color, how could the exact quality of the discrimination be proven? The difficulty is inherent. The motives of the county officers in selecting persons for

jury service are too subtle, too subjective, to admit of positive proof.

We have now answered the question as to what effect the operation of the Fourteenth Amendment has had on the States in relation to the negro race problem. We have seen that no actual and practical restraint has been put upon the States in any instance where the State action was brought in question. What elements of potential restraint the Amendment has imposed or now imposes upon the States in this particular, remains a matter of speculation. How far a State may go in the attempt to apply a practical solution to the negro problem also remains to be seen. So far they have not been checked by the Federal Government. In the broad day of an enlightened public opinion, world-wide in its reach, it is not probable that backward steps will be taken. New acquisitions from the growing social and biological sciences are bringing to us a clearer and a saner point of view than that evolved from the philosophy and theology of the past generation.

In conclusion we may ask what positive gain has the operation of the Fourteenth Amendment been to the negro race? We can point to nothing. All attempts at Federal intervention have been fruitless in permanent results. The operation of the Amendment in its relation to the negro race has in it all of the irony of history. It is the perversion of a noble idealism that the lowest and most benighted element of the African race should in these enlightened days be the ones to rise up and claim the sacred heritage of Anglo-Saxon liberties which, through the fortune of circumstance, have become embodied in the supreme law of the land in the shape of the Fourteenth Amendment.

But, it may be said, the Amendment is the negro's Magna Charta—it is to him a perpetual guarantee of protection from discrimination. We have seen, however, that the validity of this assertion is reduced to an uncertain and undefined minimum by the facts. If it be his charter of

liberty it is indeed a strange one. In what respect does it protect him from his State? He does not know. Unlike the charters of other people, it was written there not by his efforts nor dictated at his command. It speaks to him a strange and far off language. It has not come and dwelt with him because it belongs not to his world. It is spending its force in other fields to which the negro is perforce a stranger.

The words "citizen," "life, liberty and property," "due process of law," and "the equal protection of the laws," were born through a travail in which the African had no share. They breathe the sacred symbols of a race which paid the price for greatness. They are the fruit of unmeasured sacrifice and suffering, of innumerable and lengthened struggles through defeat and failure to final victory. They are the key words of that race which has, among all of the peoples of the earth, shown the highest genius for law and government. They can never be superimposed from without. The great truths which they embody can come into being only through the birth pangs of the inner life.

The Fourteenth Amendment declared the negro to be a citizen of the United States of America. This may, in the abstract, be considered a great advantage. But it is a serious matter to be a citizen of a country like the United States. Its ideals of citizenship presuppose centuries of independent personal and racial achievement. It looks for a soil out of which it is possible for democracy to spring. In the words of an eminent statesman and patriot: "It throws upon him a great responsibility and expects of him a constant and watchful independence. There is no one to look out for his rights but himself. He is not a ward of the government, but his own guardian. The law is not automatic; he must himself put it into operation, and he must show good cause why the courts should exercise the great powers vested in them. * * * In England, as in America, the individual citizen is bidden to take care

of himself, not only against his neighbor but also, if he can, against the government.'"⁶¹

These remarks were spoken to white men. They refer to white citizens. They give voice to one of the most profound principles of English and American government. Yet they apply also to the Afro-American. They speak to him with redoubled force. They set before him the most exalted ideal of citizenship yet achieved by man and bid him reach it if he can. There is a touch of pathos in all of this. The negro has been the only innocent party in this turmoil of the times. He at least, by every moral law, has been entitled to have justice meted out to him. On the contrary he has been used as a tool first by one section of the country then by the other. He has served only the purposes of the controlling element of the stronger race. And finally, to satisfy the political idealism and the partizan plans of those to whom he himself was a stranger, he has been thrown naked, penniless and deserted upon the land to pick his way in the midst of the highest and most complicated civilization known to the earth.

The adoption of the Fourteenth Amendment could not make Anglo-Saxons out of Africans. It was unjust to the negro to force him to play a role for which by the forces of nature he was unfitted. He deserves neither ridicule nor blame for the comedy and the tragedy of the Reconstruction. It is one of the fundamental precepts of political science today that only those people in a community can participate equally in its civic, social and political life who are conscious of a common origin, share a common idealism and look forward to a common destiny. Where the community is composed of two divergent races rendering such a community of life impossible, the weaker and less favored race must inevitably and in the nature of things take the place assigned to it by the stronger and dominant race. The Republican party, which controlled

⁶¹ Woodrow Wilson, "Constitutional Government in the United States," pp. 150, 151.

all branches of the government after the War, might have made the negroes wards of the nation, putting them into a position similar to that occupied by the American Indians. They, especially at that time, needed the protecting arm of the Federal Government thrown around them. Under this system of sympathetic tutelage the African might have been led to develop whatever latent powers that may be inherent in his race. Today he can justly raise the cry that many of the doors of opportunity are closed to him.

As it now stands, the negro must look to his State for protection. He must take his chances along with the other citizens. If in the unequal struggle he fails to gain for himself the full fruits of citizenship, there is no recourse left to him. The strongest point in his favor is that he is human and his long sojourn in the midst of a naturally kind hearted people has brought about certain tacit understandings and adjustments, the written Constitution to the contrary notwithstanding.

WASHINGTON, D. C.

CHARLES WALLACE COLLINS.

THE VALUE OF PRECEDENT.¹

Horne Tooke said in his "Petition of an Englishman": "You have a precedent in Cade. And for the justification of any infamous and dirty business, it is at present sufficient that there is a precedent." Somewhat later the great master of Rugby wrote: "Nothing has even been more pernicious to the growth of human virtue and happiness than the habit of looking backwards rather than forwards for our model of excellence." When Cardinal Mazarin was outlawed by the Parisian Parliament, the records were searched to ascertain what price should be set upon the head of so illustrious an enemy of the kingdom; and, it having been found that, in the reign of Charles IX, the sum of fifty thousand crowns had been voted by parliament to whomsoever should produce Admiral Coligni, alive or dead, a similar sum, out of respect to precedent, was fixed in Mazarin's case. When a reforming Czar of Russia found a useless sentinel standing alone in the middle of a lawn, and ordered an inquiry to be made for the apparent extravagance, he found that a century before the Empress had a fruit tree on the lawn, and had set a soldier one day to guard the ripening fruit. The fruit had been used, the Empress had died, and the tree had long ago decayed and disappeared, but the force of precedent had kept a useless sentinel at the post. We smile perhaps at this instance of an ancient precedent as though we were entirely superior to such influences. In 1898, however, when some newspaper correspondent, hard-pressed for a sensation, started the story that the Spaniards were about to blow up the Capitol at Washington, Congress, in order to keep the Spaniards off, put on duty (and the payroll) fifty extra loyal policemen, and they and their duly

¹ "Precedent is a fruit of reason ripened by time."—BALDWIN.

elected and qualified successors, out of respect to the precedent, remained on duty (and the pay-roll) until 1911. Such is the power of precedent in ordinary affairs. King Charles and his political advisers, therefore judged correctly when they resolved upon the arrest of Sir Robert Cotton, the antiquarian, because he furnished the leaders of the popular party with precedents. But Tooke was denouncing executive precedents; the benign Dr. Arnold was thinking of moral precedents; while the Parliament of Paris was applying the doctrine of precedent in a political case.

The force of precedent and the instructive use of it in all kinds of cases has been well stated by Sir. Frederick Pollock, as follows:

"If we may draw inferences from the childhood of the individual to that of the race, one or two instances probably sufficed to make a good custom for our prehistoric ancestors. It is notorious that young children will appeal to precedent in support of their requests almost as soon as they can frame a coherent sentence. They will allege, if they can, the leave of a competent authority as already had, as by offering such a plea as 'Mamma lets me do it' to a father's prohibition of sports threatening danger to the child or destruction to furniture. But if the authority referred to turns out (as generally happens) not to support the argument, the child's artless cunning falls back on the defense of bare precedent. 'One day I did it,' or words to that effect, are brought out with an air of perfect seriousness and confidence; and though the plea is overruled, it is at least doubtful whether the pleader is intellectually satisfied. It may be suspected that we have in these involuntary revelations of infant logic the true primitive form of the universal argument of archaic conservatism. 'One day I did it,' is the simple and undisguised statement of the mental process more plausibly expressed by children of larger growth in the shape of 'Our fathers have always done so.' The child is father of the man in more ways than have yet been observed with adequate care."

My subject, however, is legal precedent, and those attending elements which go to give it value, or to discredit it. The term necessarily implies the existence of some former decision of a case. Chief Justice Wray compared a case without a precedent, to a bastard who had no cousin. It was a favorite maxim of Lord Macclesfield that it is often of little consequence how a point is determined at first, so it be adhered to; then the law will be known; and

the inconvenience, by being foreseen, may be avoided. "The chief merit of a rule of law," says Mr. Bryce, "is that it should seize a feature which a large set of instances really have in common, and should effectually provide for them, and for them only."

Precedent carries the idea of reliance—of obedience; it is antagonistic to leadership. What, then, will amount to a legal precedent? Broadly speaking, every decision of a case is a precedent, either of more or less value,—or perhaps of no value, if I may be permitted to use so contradictory a phrase.

But a precedent in law, in its fullest and best sense, is a decision in a contested case, arrived at after patient inquiry into all points bearing upon the doubtful question, by an impartial judge, who stands between or above the contending parties. Any other kind of a decision may be a precedent, but it would not be entitled to that high respect that is due a decision of the character above described.

From the study and application of precedents we have evoked that doctrine which modern writers call by the more convenient and accurate name of "Case-law," which Sir Frederick Pollock has picturesquely described in hostile popular language as a servile following of precedents tempered or supplemented by transparent fictions. "The State of English Case-law, as a whole," he says, "might be not unfairly described as chaos tempered by Fisher's Digest." Nevertheless, the doctrine of Case-law, in the application of precedents to the trial of questions of law, is of paramount importance in English and American legal procedure. Bracton began the practice by citing some 500 precedents from Martin Pateshull and William Raleigh as early as 1265; and in the following reign of Edward I, which gave us the first Year-Book, the pleaders are citing and distinguishing previous cases. "The judgment to be given by you," said Herle, *arguendo* in 1304, "will be hereafter an authority in every *quare non admissit* in England." Up to the time of Edward I, the royal jus-

tice was making the common law; after that time, it was correcting and settling it. And of all the means so used that of precedent was perhaps the most powerful.

Let us first consider briefly the extrinsic elements that go to make a decision valuable; and then, the decision itself. It is one of the characteristic features of English law that decisions are never given except in actual cases. Moot questions will not be considered. It is, therefore, the importance necessarily attached to the decision of an actual controversy that adds much to the value of a decision. Instead of being an academic discussion, or an opinion of some learned man upon an abstract proposition, after the Roman fashion, we have in every case, a judgment upon the property rights of two or more persons, delivered with the seriousness and honesty of purpose that goes with such a responsibility.

In the next place, we have the decision as the result of a contest by opposing counsel. No one of any extended experience, be he lawyer or layman, will deny the assertion that argumentation is the touchstone of truth. "Things," said Lord Bacon, "will have their first or second agitation; if they be not tossed upon the arguments of counsel, they will be tossed upon the waves of fortune; and be full of inconstancy, doing and undoing, like the reeling of a drunken man."

And, as was quaintly put by Justice Hankford in the Year Book of Henry VIII: "One should not know of what metal a bell was unless it were well beaten; *quasi diceret* by good disputing the law shall be well known." "No man," said Sir Edward Coke, in the preface of his Ninth Report, "alive with all his uttermost labors, nor all of the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in a court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right."

It is a trite but true aphorism of our profession that the

way to learn the law is to practice it; and it is no less true that great lawyers are developed, if not, indeed, made, only in the conflicts at the bar, while judges can become great only by the aid of the bar that surrounds them. A good argument is the best possible preventive of error in the opinion. "Mistakes, errors, fallacies, and flaws elude us," says Judge Dillon, "in spite of ourselves, unless the case is pounded and hammered at the bar." One of the most essential prerequisites, therefore, of a strong precedent, is a strong argument. Coke says "The Case of Postnati" (Calvin's Case) was the greatest case that ever was argued in the Hall of Westminster, and he apologizes for the space given to it in his Seventh Report by saying that its great value was due to the fact that it was argued by Solicitor General Bacon, Lawrence Hyde, Attorney General Hobart, Sergeant Hutton, and "then by all the judges of England",—fifteen in number.

Next in importance, perhaps, is the force and character of the court or judge that decides the case. "It is a very great mistake, common to counsel, and especially to young counsel," said Mr. Justice Miller, "to consider that a decision of any court must necessarily command the respect of another.—The main value of former decisions as precedents consists in the fact that they are the judgments of a court of competent jurisdiction and respectability—While the main value of the authority of adjudged cases is in the character of the court which decided them, it often occurs that this value is very much enhanced by the standing of the judges who delivered the opinion."

It needs no argument to convince one that the best statement of the common law of England is to be found in the decisions of the King's Bench, the Common Pleas and the Exchequer Courts; the Admiralty law in the decisions of Lord Stowell; and Equity in the opinions of Hardwicke, Eldon, Cairns and Jessell.

Speaking of individual judges, what well-informed and discriminating lawyer would pass by an opinion of Mar-

shall or of Mr. Justice Samuel F. Miller upon a constitutional question; or an opinion by Lemuel Shaw or John Bannister Gibson, upon a general question of American law; or one by Kent in an equity case, or of Story or Taney in Admiralty, for the opinion of some other judge upon any one of these several subjects? Nevertheless, it was a standing joke of a late distinguished member of the Louisville bar that one of the juniors of that bar urgently insisted in argument, upon the controlling authority of a decision of the "Carpet-Bag" Supreme Court of Florida, which, in express terms, overruled one of Chancellor Kent's best considered opinions in 1st Johnson's Reports. I do not mean to say that all really great judges have received due recognition of their greatness, or that many of us do not err in our estimates of judicial greatness; lawyers, like other people, are often influenced by passion and prejudice. This infirmity has been strongly exemplified in the case of Chief Justice Taney, of whom Hampton L. Carson, of Pennsylvania, in his "History of the Supreme Court of the United States," said: "In knowledge of technical details in all departments of legal learning, in the mastery of principles derived from constant and varied occupation in the argument of causes in courts of inferior and superior jurisdiction, both state and national, he excelled every one of his predecessors."

Nevertheless, because of a decision involving a political question, and for which he was no more responsible than any other of the concurring members of the court, some lawyers have deprived themselves of the benefit and assistance to be derived from a consideration of the opinions of this master of the law. A somewhat parallel case is seen in the experience of Mr. Justice Bradley. On the other hand it sometimes happens that the authority of a great name is the main, if not the only support, of some questionable or quixotic doctrine of the law, which has obtained general approval. What, except the great name of Story, could have given current circulation and approval

to his misleading and needless assertion in *Wood v. Dummer*, 3 Mason 308, that the capital stock of a corporation constituted a trust fund for the payment of its debts? The desired result was obtainable under a simple application of the doctrine of fraud; but the great name of Story was sufficient to supplant for a time the old and simple doctrine with a new and confusing one. Nevertheless, it has remained for Prof. Gray of Harvard Law School to say as late as 1909, that while Story was fond of glittering generalities and was possessed by a restless vanity, he "was a man of great learning, and of reputation for learning greater even than the learning itself." ("Nature and Sources of Law," 239). In the result of a combination of these two extrinsic conditions—a case well argued by able counsel, and an opinion from a great court or judge—we have the very highest degree of precedent. A good instance of such a result is found in *Marble Company v. Ripley*, 10 Wall., 339, in which the argument for the appellant by Benj. R. Curtis and Edward J. Phelps, and by George F. Edmunds and William M. Evarts *contra* was followed with an opinion by Mr. Justice Strong.

Again, we sometimes have the right to look to particular courts for excellence in particular branches of the law. This may arise from the history of the court, or of the times, the character of the community, or other reasons. Thus ordinarily, we should expect to find questions of purely commercial law better considered by the courts of those states having large cities than in those states which are agriculturally predominated, and *vice versa*.

The decisions of the courts of New York and Massachusetts upon questions of commercial law, and the decisions of the Kentucky Court of Appeals upon land law have become pre-eminent for their excellence. Speaking of the latter, Judge Story, in his "Miscellaneous Writings," said: "The land law of Kentucky, while it stands alone in its subtle and refined distinctions has attained a symmetry which at this moment (1821) enables it to be studied al-

most with scientific precision. So little assistance can be gained from the lights of the common law for its comprehension that, to lawyers of other states it will forever remain an unknown code with a peculiar dialect, to be explored and studied like the jurisprudence of some foreign nation."

Neither would we look to Louisiana with the Roman Law as the basis of its jurisprudence, for common law principles; and, we could scarcely be expected to look to the "Military Court of Appeals" of Virginia, of reconstruction times,² composed of two soldiers and one civilian—drawing one salary from the State as judges and another from the United States as soldiers—for sound views upon those constitutional requirements that the executive and the judicial powers of the government shall be confined to a separate body of magistracy, and that no person being one of those departments shall exercise any power belonging to the other. And in speaking of the earlier decisions of the Courts of New Hampshire, Reinsch says: "It may be said that no real jurist, no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power in New Hampshire during the entire Eighteenth Century"³ This corroborates, in part at least, Jefferson's statement made in 1810, that there never was nor never can be a profound common lawyer from the New England states."⁴

Furthermore, the decisions of a court composed of competent judges may, for some technical reason, be merely opinions of lawyers and of no value as precedents, since they do not dispose of anything.

Thus, we present the anomalous situation in Kentucky of having a volume of Reports⁵ containing 77 opinions of "Cases Argued and Decided in the Court of Appeals of

² 19 Grattan 544-669.

³ 1 Sel. Essays in Legal History, 388.

⁴ Works V., 550.

⁵ 2 T. B. Monroe.

Kentucky," in 1825, while no one of those cases has ever been referred to or cited by the Court of Appeals in the other 142 volumes of Kentucky Reports.

The judges of that court—Barry, Haggin, Trimble, and Davidge—were lawyers of reputation and ability. But, as judges of the "New Court,"—an unconstitutional court—"they were not judges; that they were not, is our unhesitating opinion," said the court in *Hildreth's Hrs. v. McIntire*,⁶ and for that reason their opinions have remained upon our shelves for nearly a century, as so much rubbish. As precedents they are of no value whatever; they are not the decisions of a court; they decide no case.

Let us now briefly examine the case intrinsically and see what it is, of itself, in addition to these extrinsic elements, worth as a precedent. It has been well said that the chief weapon of a lawyer of the highest grade, is his criticism of cases. But it is equally a branch of their duty, and one of still greater importance to the community, to expound the law they administer upon such principles of argument and construction as may furnish rules which shall govern in all similar or analogous cases.⁷ In *Attorney General v. Skinner's Co.*⁸ Lord Eldon stated the principles which had guided him in the construction of his judgments in these words:

"In great and important cases I have endeavored to sift all the principles and rules of law to the bottom, for the purpose of laying down, in each important case as it arises, something in the first place which may satisfy the parties that I have taken pains to do my duty; something in the second place, which may inform those who, as counsel, are to take care of the interests of their clients, what the reasons are upon which I have proceeded, and may enable them to examine whether justice has been done; and further something which may contribute towards laying down a rule, so as to save those who may succeed me in this great situation much of that labor which I have had to undergo, by reason of cases having been not so determined, and by reason of a due exposition of the grounds of judgment not having been so stated."

But how are we to determine precisely what principle of law has been established by a particular decision; how

* 1 J. J. Mar. 208.

* 1 Douglas, 111.

* 2 Russ. 437.

are we to find the doctrine of the case? It is everyday law that if the language of the opinion goes beyond the necessities of the decision, and contains observations which, though in themselves valuable as a statement of principles, and often sound principles, they are nevertheless *obiter dicta*, and are to be treated merely as suggestions of the judge who wrote the opinion, and not as the decision of the court.

What then are the proper bounds by which we are to confine the doctrine of a case? A decision without an opinion creates a precedent. Strictly speaking, therefore, does not the same principle which rejects *obiter dicta*, and requires that the court need not and should not do more than the particular case demands, make it unnecessary for the court to file an opinion giving the reasons for the decision? In the absence of some statutory requirement that a written opinion must be filed, does not the court perform its full duty when it decides the case by giving judgment for one or the other of the parties? These suggestions, when followed out, may aid us in getting at the true doctrine of precedent. A mere decision without a statement of the points in controversy, would be of little value. Hence, we have in many of the earlier reports an elaborate statement of the pleadings and proof by the reporter, followed by a simple resolution of the court, giving its judgment. In modern times the opinion usually states the facts and the legal rules which must control them, in the case in hand. The opinion may go further and give elaborate reasons for the conclusion reached; and this frequently introduces language and illustrations that may, in the opinions of others, be erroneous or inapplicable to the state of the facts under consideration. It follows therefore that the very words actually used in the opinion are not necessarily to have the force of precedent, since they may contradict the ruling of the court. The force of precedent is reserved for the proposition or rule of law necessarily involved in the decision of the case, whether that proposition

be stated by the court broadly, narrowly, wrongly, or not at all. (Wambaugh 20.)

The idea has been elaborated in *Dubuque v. C. R. Co.*⁹ as follows:

"Let us inquire what is meant by the term, precedent, and what element in a case is to be followed under the rule *stare decisis*. It is not the judgment which the court pronounces upon the rights of the parties involved in the suit. A judgment that A. recovered of B. \$1,000 is not to be cited as a precedent in a subsequent case to support the right of C. to recover the same sum from D., for the judgment is simply a conclusion reached by the application of rules of law to certain facts. We are to look farther in a case than to the judgment to find that which constitutes a precedent. It is found in the rules of law, which are the foundation of a judgment. These rules constitute the formula by which rights of parties are to be determined. When settled by adjudication, courts under the doctrine *stare decisis*, are required to apply them to subsequent cases. Upon the authority of the decision announcing them they are to be taken as correct. When we look to a case which is called a precedent, we search out these rules for application to the facts in dispute before us; the judgment therein constitutes a rule in no sense—it is evidence of the application of rules, legal formulae to facts; it is the formal recognition of such rules. A case is to be regarded as a precedent when it furnishes rules that may be applied in settling the rights of parties. These rules are to be discovered in the opinions of the judges, and constitute the reasons for the decision. Lord Mansfield says: 'The reason and spirit of cases make law; not the letter of particular precedents.' *Fisher v. Prince*, 3 Burr. 1364. And Lord Holt declares that 'the reason of a resolution (judgment) is more to be considered than the resolution itself.'"

I have found the rule nowhere better stated than in the following language of Judge Caruthers, in *L. & N. R. R. Co. v. County Court*.¹⁰

"It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, and it is only authority to that extent. The reasoning, illustrations or references, contained in the opinion of a court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court. The reason of this is manifest. The members of a court may often agree in a decision—the final result in a case—but differ widely as to the same conclusion. It is then the conclusion only, and not the process by which it is reached, which is the opinion of the court, and authority in other cases. The law is thus far settled, but no farther. The reasoning adopted, the analogies and illustrations presented in real or supposed cases, in an opinion, may be used as

⁹ 39 Iowa, 79.

¹⁰ 1 Sneed (Tenn.), 695.

argument in other cases, or they may not. In these the whole court may concur, or they may not. So of the principle concurred in and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration. If this were not so, the writer of an opinion would be under the necessity in each case, though his mind is concentrated upon the case in hand and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations and qualifications which every variety of facts and change of phase in cases might render necessary."

In *Cohens v. Virginia*,¹¹ Chief Justice Marshall stated the doctrine as follows:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom investigated."

Speaking in general terms, therefore, it may be said that the doctrine of a case is to be arrived at by determining the *ratio decidendi* of the decision through a strict exclusion of all surplusage of language, and illustration; and that the value of the case as a precedent is restricted to the points necessarily embraced in the judgment.

But when this has been determined in any given case there are other elements which may weaken its force as a precedent when compared with other like decisions. Useless as they are, we have in the books repeated instances of opinions in cases which have been affirmed by an equally divided court. Since it requires, however, a majority of the judges of a court to affirmatively announce a rule of law, it follows that an affirmance by an equally divided court—an affirmance from necessity as it is sometimes called—can have no force or authority as a precedent, in America.¹² No controlling rule of law has received the approval of the court, and no written opinion can change that fact. And

¹¹ 6 Wheat, 399.

¹² *Etting v. Bank*, 11 Wheat, 78;
Durant v. Essex County, 7 Wall, 110.

while the judgment of the lower court is affirmed in cases of a divided appellate court, the value of the judgment of the trial court as a precedent is destroyed by the failure of the appellate court to confirm it.

The ten pages of opinion by Judges Lewis and Pryor, followed by the eight pages of dissent by Judges Hines and Hargis in *Commonwealth v. Whipps*,¹³ are of no more value as a precedent than the one line opinion of the equally divided court in *Fruin Colnon Contracting Co. v. Chatterson*.¹⁴ It was said, however, by Lord Chancellor Campbell, in *Beamish v. Beamish*,¹⁵ that an affirmance from necessity by the House of Lords makes a precedent of full force.

Furthermore, a decision by a minority of the court, although it goes as the opinion of the court, is nevertheless not the opinion of the court. Whenever the fact that it is a minority opinion, appears, its value as a precedent is at once destroyed. This point is well illustrated by an incident in Kentucky's history. In the important case of *Green v. Biddle*,¹⁶ the United States Supreme Court had held the Kentucky Act of 1812, relating to the rights of occupying claimants of land, unconstitutional in that it violated the compact between Kentucky and Virginia. Nevertheless, that decision was persistently and successfully ignored as a precedent by the Kentucky Court of Appeals, for the reason that *Green v. Biddle* had been decided by three only of the seven judges that composed the Supreme Court of the United States; "and being the opinion of less than a majority of the judges, cannot be considered as having *settled* any constitutional principle."¹⁷

Again, it is often said that a dissenting opinion weakens a case as a precedent both in the home jurisdiction and in other jurisdictions. But certainly a dissenting opinion should not weaken the precedent in the home jurisdiction, since there the point actually decided must be treated as

¹³ 80 Ky., 269.

¹⁴ 144 Ky. 308.

¹⁵ 9 H. L. C. 338.

¹⁶ 8 Wheat 1.

¹⁷ *Bodley v. Gaither*, 3 T. B. M. 58; *Clark's Hrs. v. Gale's Hrs.*, 5 J. J. M. 315

the established law upon the subject in all inferior courts, and should be so treated by the court of last resort, of that jurisdiction. And, if a case has been well considered and argued out in the conflicting opinions of the judges, should not that fact strengthen rather than weaken the decision as an authority? If the question is ever to be put at rest, should not a decision thereof after full consideration, be the end of it, even though a minority of the judges should dissent therefrom?

But when all or a majority of the judges concur in the decision, the value of the case as a precedent may be diminished, if not destroyed, if the reasons given by the prevailing judges differ from each other.

In *Dubuque v. I. C. R. R. Co.* above referred to, the court consisting of four judges, said:

"There must be a concurrence of a majority of the judges upon the principles, rules or law, announced in the case, before they can be considered settled by a decision. If the court is equally divided, or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court. It is of frequent occurrence in this court that two judges, adopting rules that are not recognized by the others, reach thereby conclusions approved by all. Who would claim that such rules are to be regarded as law announced by this court? Certainly it cannot be claimed, if a decision be reached by the adoption of diverse rules by different members of the court, that it is to be regarded as authority. We have seen that the rules of law followed in a decision, constitute what we call a precedent. If the judges do not agree upon those rules, and less than a majority concur in them, the decision is not authority."

We have in Kentucky, and perhaps in other States, another class of cases of somewhat diminished value as precedents, in the shape of "manuscript" opinions, and "opinions not to be officially reported," although they have been reported in unofficial publications. The thirty-three volumes of the *Kentucky Law Reporter*, covering the period from 1880 to 1908, and the six volumes of "*Kentucky Opinions*" covering a period immediately preceding the period of the *Kentucky Law Reporter*, contain several thousands of the opinions of the Court of Appeals which have not received the sanction of an official reporting. Are they of equal value as precedents with an officially reported

case? True, both are opinions by the same court; yet are they of equal dignity? If there should be a conflict of principle between the doctrine of two cases and one of them should be officially reported in 100 Kentucky, and the other unofficially reported in 19 Kentucky Law Reporter, which would be the prevailing precedent? I am not aware that any case found in the "Kentucky Opinions" has ever been cited by the Court of Appeals; yet they are opinions of that court, delivered in the usual and regular course of its business.

There are other qualities of a decision that may affect its value as a precedent, which I have time only to mention. A decision which relies upon a misunderstood or overruled case, or upon the authority of a text-book which is not sustained by the cases cited to sustain the text; a case of first impression, and of course, not supported by subsequent decisions and the experience of other courts; an *ex parte* case—one not rendered in the course of hostile litigation; and decisions in appeals taken by the State to settle the law in criminal cases, where the accused has been acquitted and is free from the jeopardy of another trial;—all of these cases are of or more or less impaired value as precedents.

It will at once be recognized that legal precedents are the result of judge-made law, and are foreign to the field covered by statute law. While a statute may change the substantive law theretofore announced by the court it can scarcely change the mental operations by which courts arrive at their conclusions; it cannot abolish reasoning by analogy, or the use of precedents.

We have in Kentucky a queer instance of a vain attempt at legislative interference with the doctrine of legal precedents. By the Act of 1808 the Kentucky Legislature said "that all reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the fourth day of July, 1776, shall not be read nor considered as authority in any of the courts of this Commonwealth, any usage or custom to the contrary

notwithstanding."¹⁸ In the same year, upon the argument of *Hickman v. Boffman*, in the Court of Appeals,¹⁹ Henry Clay was not permitted to read from East's Reports, because to do so would violate the Statute. The Reporter's account of the colloquy between Mr. Clay and the court is too good to be omitted in this connection:

"In the argument of this cause, Clay offered to read from 3 East's Reports, 199, 200, that part of Lord Ellenborough's opinion in which, after stating the law to be that where it presumes the affirmative, the negative must be proved, he proceeds to recapitulate the adjudged cases, in support of this rule.

The Chief Justice stopped him and stated it was a violation of the act of the last session of Assembly, which enacts that "reports and books containing adjudged cases, in the kingdom of Great Britain, which decisions have taken place since the fourth day of July, 1776, shall not be read or considered as authority in any of the courts of this commonwealth." etc.

CLAY.—I do not read or rely upon the opinion nor decision in 3 East. I only use that book to show what other books contain, as Rolle's Reports, etc., which are authority, but which we have not at this place. I would use a newspaper in the same way. This is no more a violation of the act than it would be to use books reported before, but reprinted since 1776; and surely they cannot be prohibited.

ALLEN.—The books prohibited ought not to be used at all. If these adjudications are not evidence of the law, they cannot be evidence of what the evidence of the law contain. It is just as proper as to permit a negro, who is not a competent witness, to state what a white man said, and permit this to go to jury as evidence.

HUGHES AND WICKLIFFE.—There are many books which are not authority, but which ought to be read and used, for the sound and clear reasoning they contain, as Pothier on Obligations. When a book is not used as authority, it ought not to be prohibited from being used for any other purpose. The legislature had no right to pass the law. The mind of the judge should be free and unshackled, to receive light from every source. He is then answerable to them for the result of his decisions. They had no more power to pass the law than they would to prohibit a judge the use of his spectacles.

JUDGE TRIMBLE.—If the book is not to have credit as law, it cannot have credit for what the evidences of the law contain. The Legislature seems to have intended entirely to prohibit the use of these books in court; and thus to cut off the importation of them. I can have no doubt but the Legislature had the power to pass the law in question.

EDWARDS, CH. J.—I can not doubt the power of the Legislature on this subject. It was proper that some period should be fixed by law, after

¹⁸ 3 Litt. Laws 457.

¹⁹ Hardin, 364.

which the decisions of the British courts should be prohibited. I can not think any rights are withheld or impaired by the act in question.

BY THE COURT.—The book must not be used at all in court."

A similar ruling was made in *Gallatin v. Bradford* at the same term of the Court. And, although the lawyers and courts obeyed the statute for many years, the contempt in which it was held is shown by the following excerpt taken from the preface of the fourth volume of *Littell's Reports*, published in 1823:

"It is not perceived," says Littell, "how a lawyer could violate this Act, except by reading, *in one argument*, or at least in one cause, all the causes adjudged in all the English courts since the 4th of July, 1776; a crime which, it is believed, no lawyer would commit, if he could; or could, if he would."

In 1821, Chief Justice Boyle, in *Noble v. Bank of Kentucky*,²⁰ referred to the statute of 1808 in the following language:

"The use of post-revolutionary cases in the courts of this country having been proscribed by the Legislature, we can avail ourselves of the light those cases have shed upon the point in controversy, only through the medium of the elementary treatise upon the subject."

And in 1827, Chief Justice Bibb said: "So far as the reasoning and illustrations of principles contained in those reports can enlighten the understanding and persuade the judgment, they are useful, and have been used out of court."²¹

Gradually, however, the Act of 1808 came to be generally disregarded, and before Mr. Clay's death we find Chief Justice Simpson expressly relying upon *Doe v. Moore*,²² as an authority to sustain *Hughes v. Hughes*.²³ Strange though it may seem, the Act of 1808 is still carried, in an emasculated form, in Section 2418 of the Kentucky Statutes, out of respect perhaps, to the legislative precedent set more than a century ago.

²⁰ 3 A. K. M., 364.

²¹ 14 East, 601.

²² *Leigh v. Everheart's Ex.*, 4 T. B. M., 381.

²³ 12 B. M., 117.

On the other hand, it should not be overlooked that of the principles and rules which constitute a part of the common law prior to 1776, only those which so existed prior to the fourth year of James I²⁴ are, or ever were, in force in Kentucky.²⁵

Finally, the net result of what has been said is well stated by Kent:

"The great difficulty as to cases," said he, "consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. The exercise of sound judgment is as necessary in the use, as diligence and learning are requisite in the pursuit of adjudged cases."²⁶

It is not within the scope of this paper to go into the doctrine of *stare decisis*, which requires a court to follow its own precedents. We are concerned only with those qualities which give value to a case as a precedent. That the law grows by means of precedents may be seen from a slight examination of any case book used in our modern law schools, where each case given, not only establishes a precedent for some principle, but goes one step farther than the one before it, and thus establishes a new precedent; and so on until the subject has been covered by cases recognized as precedents. It is but another illustration of the ultra conservativeness of the English-speaking race. Wherever it may be found—in England, America or Australia—it carries with it the sturdy qualities of the race, gradually but constantly growing in civilization, and always presenting, in the words of Tennyson:

"A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent."

LOUISVILLE, KY.

SHACKELFORD MILLER.

²⁴ Mar. 24, 1607. ²⁵ Ray v. Sweeney, 14 Bush I. ²⁶ 1 Com., 478.

LYNCHING UNNECESSARY.

A REPORT OF COMMONWEALTH V. CHRISTIAN.

The proverbial law's delays and lynch law both merit condemnation. Each breeds the other, for retributive murder without trial exists only where the law is inefficient, while so-called technicalities are often only a revulsion from stringing up the innocent. They have but one thing in common, namely, publicity in the American press, and in this respect they have a lamentable preference over efficient justice which pursues its even way without attracting the reporters. As a protest against the over emphasis placed on the two bad things by publicity, I deem it my duty, as it is my pleasure, to submit to the public and the legal profession this report of Commonwealth v. Arthel-
nis Christian, in the Circuit Court for Botetourt County, Virginia, tried February 19, 1909, and to do my best to make it as readable as if it were a newspaper report of a lynching or a phillipic against the law as a thing of delays.

Botetourt County, Virginia, lies in the foot hills of the Appalachian range, where the Chesapeake and Ohio railroad divisions join, the low grade division coming from the sea up the James River and the main line coming over the hills from Washington. Glen Wilton, the place where the crime was committed, is so near to Virginia Hot Springs that I have been over and back, to and from the Springs in a day. The effect of that pleasure resort, however, does not spread beyond the valley in which its wonderful springs rise and Botetourt County is a somewhat retired district whose inhabitants pursue their sturdy way little moved by the outside world. The county seat has never been moved down to the line of any railway and is still at Fincastle. There are, however, a few pockets of iron ore and hence a few blast furnaces—which, with other industries, go in the locality under the odd name of “pub-

lic works." One of these is the Princess Furnace, situated at Glen Wilton on the James River division of the Chesapeake and Ohio, two stations below the junction with the other division which is at the thriving little city of Clifton Forge.

In Glen Wilton on February 18th, 1909, was committed one of those abhorrent murders which are supposed to justify some men in lynching and all others in standing by and saying "I couldn't help it." My purpose is to give Bote-tourt County and the actors in this tragedy the credit which they deserve,—incidentally I hope to give others the pleasure which I have had in hearing how justice can be done by men who care for their morals and their community.

The blast furnace creates and practically is the town of Glen Wilton. The works are at and around the railway station on both sides of the track. The commissary or company store abuts on the track on the upper side opposite the station. Below is the river, above is the valley side scarred by the iron mines, and just above the works and the railway is the manager's house, perched on a shoulder of the hills and overlooking the village and the works. Next the manager's house is a long brick building which ought to be finished off into a fine house, but never has been.

The case of *Commonwealth v. Christian* began to be one which it is possible to report in print February 18, 1909, at 5:30 P. M. when the manager of the furnace, one J. E. Johnson, Jr., a native of the county and one of its board of government or "Supervisors," received over the telephone a message that the body of the little daughter of one of his foremen had been found near the railway which connects the mines with the works and about half way between the two places. He went to the place and met there the entire crew of ore miners, who had knocked off work as usual at six o'clock and had started home on the narrow gauge mine railway. For sinister reasons the name of Arthelnis Christian occurred at once to those concerned. Then the

father of the victim told Mr. Johnson that the mother remembered having seen Christian going up the road about half an hour after her daughter had started down it. The doctor and a stretcher were sent for and a guard set to prevent the scene of the struggle from being touched. Details of this guard relieved each other until it was decided not to use blood hounds. When the doctor had come and the *corpus delicti* gone, the mine train and a posse went up the mine railway to the Christian house, surrounded it and searched it and the woods around it without result. The party then returned to the village and after snatching a bite of something to eat, Johnson sat down to the telephone. Acting as chairman of the Board of County Supervisors, he had authority to offer a reward and did so, giving notice at once to the next two adjoining towns above and below him in the James River valley. He reached the Attorney for the Commonwealth, Hon. William R. Allen (who later came to Glen Wilton and did more than his duty), and the Chesapeake and Ohio Railroad detective stationed at Clifton Forge, and both promised to come down in the morning. In these days when railroads are believed guilty of every crime from arson to earning dividends an interesting question of "ultra vires" arises when one finds that from the beginning the railroad detective was a tower of strength and was put at the disposition of the county as a matter of course. Johnson next telephoned Roanoke for blood hounds, but learned that there were none there and none which could reach Glen Wilton within the ten hours after the incident which are the limit of their usefulness. These and other messages kept him at the telephone until eleven, when he went to bed.

In the meantime four of the employees of the furnace had formed one of the many searching parties which set out and had reasoned out correctly what proved to have been the line of escape. There was a passenger train up the valley just before the hue and cry went out. The baggage cars on that division have a "blind" platform, not accessible by

door and very handy for tramps and criminals. Any one who arrives on it at Clifton Forge is arrested and jailed for stealing a ride, but the train stops at a half-deserted blast furnace town part way up, called Iron Gate. Christian had "ridden the blind baggage" to Iron Gate, where he got off and went peacefully to sleep in the brick "stock house," part of the abandoned furnace works. Here the searching party found him and here for the first of many times he made a confession with which I will not soil my pen. The whistle of the locomotive of the next down river freight blew so loudly as it came into Glen Wilton about 3 A. M. that Johnson waked and suspected that something was up, and presently heard over the telephone that Christian was in the company store under guard and had confessed.

Now it would have been perfectly easy for all the law-abiding people and county officials to believe themselves powerless and to disbelieve in the power and force of the law. The result might have been a few columns of newspaper notoriety or at the most and in the end something like the report of the contempt proceedings against Sheriff Shipp which is published to our common shame in the Supreme Court Reports. What happened was different. Johnson strapped a big army Colt on in front where it would show, filled a couple of Winchesters and went down to the store with one under each arm to find what he described later as "the makings of a crowd," on which gathered and planned so rapidly that in an hour they sent in a demand that Christian be given up to them. Instead of the prisoner, out came the manager. First he made them agree to listen to him without molesting him. There was some shouting of "Let us have him," "We'll fix him," etc., but they listened to Johnson. And what he said, as near as I can collect it from many sources, one of them a most unwilling one, is this:—

"For God's sake don't bring shame on the county. I wouldn't lift my little finger to save this nigger from the

bottomless pit for his own sake, but it will be the greatest shame on the county and the greatest setback to law and order in this county and countryside and to decency and law enforcement if we let this fellow be lynched. I want you to stand by me and I'll see that he goes through the courts as he should. I promise you that, and you know me and know that I don't lie or break promises." Here two or three men in the crowd began to talk. One said, "He'll get off on a technicality," another, "Some shyster will get him off; we can't trust 'em." "Well," said Johnson, "That's all right. We'll take care of that among us. I'll give you my word of honor, and you know how long I have lived in this county and countryside, and who I am, that if any shyster lawyer gets him off on any technicality or on any ground except that he didn't do it, I'll lead the lynching party, and we'll hang the negro and the shyster to the same branch of one tree."

From time to time, during the day following, this promise came to his mind and I believe he wondered what would happen to him if, after he had stood sponsor for the law, it should go bankrupt and he should have his choice between a broken promise and the leadership of a lynching party.

But as yet things were going easily. The crowd was, at five o'clock in the morning, still a small one. They lived in the village and knew their man; many of them worked for him; all trusted him. And so they took his promise to take the prisoner to Fincastle, exacting only one strange condition. Each man was to have a right to see the prisoner and tell him what he thought of him. Guns were to be left behind and not more than three at a time admitted. This march past actually took place and took more than an hour, Christian, showing no sign of any human emotion. He was described to me as "just like an animal, no more afraid than a cow would have been." After it he was taken for greater safety up the hill to the brick house, around which the crowd could not gather, and held there under guard.

As soon as the telephone exchange opened in the morning the County Judge was called from his bed to the telephone. After the case for an early trial had been stated to him he rang off to look up the law, and a few minutes later dictated over the telephone to the County Clerk the following order for a special term of court:

The Commonwealth of Virginia:

To the Clerk of the Circuit Court of Botetourt County,
Greeting:

Know you, that the situation of Arthelnis Christian, confined in jail for trial on a charge of felony, making it proper that his case should be disposed of before the next regular term of said Court: a special term of said Court is hereby appointed, to be begun and held at the Court House in Fincastle, this day, to-wit: Feby. 19, 1909, and a venire shall be summoned to attend said term. You are therefore commanded, in the name of the Commonwealth of Virginia, to inform the attorney for the Commonwealth and the Sheriff of such appointment, to post a copy of this warrant at the front door of the Court House of said County, and issue all proper process to such special term, and the Sheriff shall execute the process. Given under my hand and seal this 19th day of February, 1909.

GEO. K. ANDERSON, *Judge*. [SEAL].

Rec'd and Entered, Feb. 19, 1909.

TURNER McDOWELL, *Clerk*.

The local magistrate nearest the scene was next reached and came to Glen Wilton, where, with due legal form and due warning of the prisoner's rights, the confession was repeated and reduced to writing.

As the day came on the situation at Glen Wilton changed for the worse. The early crowd had been from round about the village, men accustomed to obey the people in authority at the furnace. Now the strangers began to come in from up river, and these were men who believed that the accused ought to have been hung or burned long before,

and not disposed to respect local, or indeed any, authority. They were dealt with by those in charge, who circulated about the crowd, talked moderation and used diplomacy, but as one of them said, "We talked 'let the law take its course,' but I handled an army Colt all the while in plain sight."

The crucial time came when the start was made for the Court House. The trip involved getting the negro down the hill from the brick house to the company store above the station, aboard the train, out of the station, and through and past the stop at the next station, off the train at the following stop, and across country by stage to Fincastle and the Court House. A few minutes before the train time the prisoner was brought down to the store. Previously by telephone it had been arranged to stop the vestibuled train so that it would be a barrier between the crowd waiting on the station platform and the store, while on the negro coach the vestibule was to be opened on the side of the store only and was to be stopped opposite the store door. The man in charge of this part of the plan told me that the handsomest thing he had ever seen was the railroad detective as he flung the vestibule door open to receive the posse.

The curtains were drawn down, the doors locked and the train pulled down to the next station. Some of the managers of this strange enterprise had advocated taking the prisoner by buggy to this station. Others had said that such a move would be expected and met by a mob, with no friends of law and order in it—in short a fine chance to be lynched with the negro. The latter party had the grim satisfaction of passing through this mob with locked doors and drawn curtains, noting a telegraph pole with rope and noose adjusted to it.

The drive from the railway to Fincastle was uneventful. Judge, witnesses, District Attorney, prisoner and posse made a procession of hacks along a typical Virginia highway lined with farms, with brick houses, with two-

story verandahs usually empty, this time every upper verandah black with people. Only at the Court House door was there any sign of trouble. There a crowd talked lynching and the man in charge of the party fingered his Army Colt and talked shooting. The relief and revulsion of feelings at his presence inside the brick Court House at the journey's end must have been great. The party could eat and think freely for the first time since the evening before.

At two, after dinner, the court came in, the grand jury went out and found a true bill. Two good, brave, honest lawyers were appointed for the prisoner, men above technicalities and brave enough to protect an innocent man. They went to his cell to find him sleeping peacefully, waked him up, heard a third confession and found that he did not want to deny it. The panel was ready for his jury, but he pleaded guilty. Here is the record:

Virginia: At a Special Term of the Circuit Court of Botetourt County, begun and held at the Court House thereof, on Friday, February 19, 1909, the provisions of Section 3000 of the Code providing therefor having been fully complied with.

Present, the Honorable Geo. K. Anderson, Judge of this Court.

THE COMMONWEALTH

vs.

ARTHELNIS CHRISTIAN

} Felony—Murder.

This day came the attorneys for the Commonwealth and for the prisoner, and the prisoner was led to the bar in custody of the jailor of this Court, and, being arraigned, plead guilty to the indictment, his plea being tendered in person, and thereupon, with the consent of the accused and of the attorney for the Commonwealth, both entered of record, the Court, in the exercise of the discretion vested in it, proceeded to hear and determine the case without intervention of a jury, and the evidence being heard, the Court finds the prisoner guilty of murder in the first degree, as charged in the indictment, and it being demanded of him if anything he had for himself or knew to say why this Court should not now proceed to pass judgment on him according to law, and nothing being offered or alleged in arrest of judgment, it is considered that the prisoner be conveyed from the jail of this County to the penitentiary of this State at the time and in the manner required by law, and that on the 22nd day of March, 1909, the said superintendent of the penitentiary, in the death chamber there provided, shall cause the said prisoner to be electrocuted

until he is dead. And the prisoner is remanded to the custody of the jailor of this County, to be by him kept and delivered to the said superintendent or his order.

The above are true copies from the records of the above named Court.

TURNER McDOWELL, *Clerk.*

This sentence was carried out.

The nearest Botetourt County came to disgracing itself was after the trial, when Glen Wilton or some self-constituted vigilantes in it, decided to drive out all the negroes and make the town lily white. The general manager was away on business when this wave of emotion struck town, but the good, law-abiding, honest black citizens were equal to the emergencies—assisted a little, I suspect, by the general manager's efficient Quaker wife. The three best negroes in town and the negro preachers signed and posted in the company store a notice saying that all bad negroes must quit town or go to work and keep at work. This was obeyed and the trouble faded away. The general manager, on his return, merely said, "That's right. What's the use of having race trouble where the good negroes want to be good?"

RICHARD W. HALE.

BOSTON MASS.

CURRENT TOPICS AND NOTES.

OUR CONTRIBUTORS—SHACKELFORD MILLER, the writer of the paper on "The Value of Precedent," was born in Missouri, in 1856, of Kentucky parentage. He was educated in Louisville, and admitted to the bar there in 1879. He was an active practitioner at the Louisville bar until January, 1896, when he was elected by that bar to serve two years of the unexpired term of the late Chancellor Edwards. In 1897 he was elected Chancellor of Louisville by the people for a term of six years, and was again re-elected in 1903 and 1909. In 1910 he was elected judge of the Kentucky Court of Appeals, which office he is now filling. In 1905 Judge Miller and his associates founded The Jefferson School of Law in Louisville, of which he has been dean since its foundation. He has contributed several articles to the AMERICAN LAW REVIEW and other law magazines. His contribution in this number was the subject of an address by him before the Kentucky Bar Association at its last meeting.

RICHARD WALDEN HALE, the author of the article "Lynch Law Unnecessary," is a member of the Boston bar and has been a frequent contributor to our columns, contributing two articles about the Standard Oil case in 1907 and the one about "Something New in the Torrens Land Law," in the number for January-February, 1909. He has also been a frequent contributor to our notes and other editorial work. His portrait and a brief biography appeared in the number for November-December, 1907. Since that account of him was published, he has continued to practice at the Suffolk County, Massachusetts, bar, and to write articles upon legal and financial subjects for a variety of publications. He was a member of the Massachusetts legislature in 1910.

PROF. ROSCOE POUND, the author of "Puritanism and the Common Law," has been a frequent contributor to this REVIEW, and is one of the best known writers and teachers of law in the United States. His last contribution was "Law in Books and Law in Action," in our issue of January 1, 1910. (See Am. L. R., pp. 12, 118.)

CHARLES WALLACE COLLINS, JR., the author of the article on "The Fourteenth Amendment and the Negro Race Question," is a native of Alabama; a graduate of the Alabama Polytechnical Institute and a Master of Arts and a Fellow of the University of Chicago. Having pursued graduate studies in constitutional law at Harvard University and being admitted to the bar of Alabama,

he is now a member of the force of the Library of Congress at Washington.

THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION.—The new head of the American Bar Association, Stephen S. Gregory, whose portrait appears in this number, has been a member of the Chicago bar and an active practitioner in that city since 1874. A successor to the practice of Chief Justice Fuller on his elevation to the Supreme Court of the United States, he was, at the death of that eminent jurist, made one of the executors and trustees of his estate. During a long and active career at the bar Mr. Gregory has appeared in some cases of more than local importance. He was one of the counsel for the defendant in the Prendergast murder case, and in the conspiracy and contempt cases against Eugene V. Debs, and, with associate counsel, defended and successfully maintained in the Supreme Court of Illinois, the constitutionality of the law creating the sanitary district of Chicago. He also acted as special counsel for the City of Chicago in the lake front case in the Supreme Court of the United States, was of counsel for the city in the traction cases in the same court in 1906, argued for the prevailing parties the Jennie McGraw Fiske will case against Cornell University, and the trade name case as to Hall safes. He served for two years as election commissioner of Chicago, and in 1910 acted as an arbitrator under the Erdman act to settle a question of wages between a switchmen's union and various railroads. Mr. Gregory is a member of the Chicago Bar Association, of which he was president in 1899, and he held a similar office in the Illinois State Bar Association in 1905.

UNCONSTITUTIONALITY OF THE MARYLAND OYSTER TAX.—The Maryland Court of Appeals has recently passed upon the constitutionality of a state statute prescribing a tax or charge of two cents per bushel on all oysters in the shell sold within the State of Maryland, "one-half of which was to help defray the expenses of inspection (of oysters) and the other expenses of the State Fishery force, and the other half of which was to be expended in reselling and otherwise cultivating and improving the natural oyster beds and bars in the waters of the state." It will be noted that the tax was charged upon *all* oysters, so that the law applied not only to oysters in the shell taken from the oyster beds under the waters of the state itself but also to oysters taken from the beds of other states and shipped into Maryland for sale. In the case mentioned,¹ it appeared that about one-third of the oysters involved were shipped to oyster packers in Maryland from Virginia, New Jersey and Delaware, the remaining two-thirds coming from the Chesapeake Bay and its tributaries within the State

¹ D. E. Foote & Co. v. Wm. B. Clagett, Atl. Rep.

of Maryland. The statute under consideration represented the latest development in legislation designed to promote the cultivation and to increase the productivity of the extensive oyster grounds of Maryland. For several years prior to 1910, the local statutes had prescribed a tax varying from three-quarters of a cent to one cent per bushel on all oysters sold in the shell, the entire amount of which tax was presumably devoted to the expense of the inspection. Despite the fact that many thousands of bushels of the oysters were shipped from other states, that tax had always been regarded as constitutional under section 10 of article 1 of the Federal Constitution, permitting a state to lay duties upon imports or exports such as are absolutely necessary for executing its own inspection laws. In 1908, the tax was fixed at one cent per bushel. In 1910, the rate was not only doubled, but the law explicitly provided that the additional one cent should be applied toward the expense of replenishing, cultivating and restoring the natural oyster beds and bars of the state. Right here lay the inherent weakness in the statute. Departing entirely from the exemption prescribed by article 10, section 1, of the U. S. Constitution, the act boldly superadded to the regular charge for inspection purposes, a tax of one cent per bushel upon all oysters in the shell sold in Maryland, irrespective of the place from which the oysters were shipped, for the declared purpose of increasing the productivity of the natural beds and bars of the state.

The oyster packers resisted the collection of the tax, and it was urged in their behalf that the Act of 1910 was repugnant to article 1, section 8, of the U. S. Constitution, which vests in Congress exclusive power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." It is interesting to note that the lower court sustained the tax of two cents per bushel in the face of this objection, on the ground that the State of Maryland had a proprietary interest in all oysters caught within the state, which interest entitled it to charge what it would, whether in the form of a license for catching the oysters or a charge or tax assessed at the time of sale. In answer to the point, pressed in behalf of the packers, that a considerable portion of the oysters came from beyond the state, the lower court adopted the principle announced in a series of cases known as the "game cases",² and found that the protection of Maryland oysters required the imposition of a tax which would be uniform in its application to *all* oysters, irrespective of the place of shipment. Obviously the learned judge below was influenced by a strong desire to support a revenue measure, or, as the Appellate

² *Lawton v. Steele*, 152 U. S. 138; *Geer v. Connecticut*, 161 U. S. 519; *Dickhaut v. State*, 85 Md. 669; *Stevens v. State*, 89 Md. 669; *State v. Harrub*, 95 Ala. 176; *Organ v. State*, 56 Ark. 267; *People v. O'Neill*, 33 L. R. A. 696, 699 (Mich); *People v. Hesterberg*, 3 L. R. A. N. S. 163 (N. Y.).

Court afterward said, he acted "in recognition of the duty to sustain the law of the state if possible to do so."

But the Court of Appeals approached the consideration of the subject upon the broad issue of the conflict between the supreme power of Congress, within certain limitations, to regulate commerce among the states, and the right of an individual state to determine methods for raising funds required for its public purposes. Quoting from an earlier case,³ the Court of Appeals said:

"It is proper to say that the taxing power of the state is of vital importance to it; indeed, so essential is the power that the very existence of the state depends upon the right to exercise it. All persons and property, therefore, within the jurisdiction of the state, are liable to it; and the power is conferred upon the state for the benefit of the entire body politic. The power resides in the state as an attribute of its sovereignty, and the right of the legislature, as the representatives of the people, to exercise it, should never be questioned, except in plain cases, where the power is relinquished for valid consideration, or where to prevent its abuse, it has been placed under restriction, either as to the subjects liable to, or the mode and manner of its exercise."

The court then considered the great constitutional question involved. The Act of 1910 unquestionably applied to oysters shipped from other states as well as to oysters caught within the state. It was conceded in defense that at least one-third of the oysters involved in the dispute had been shipped into the state from Virginia and New Jersey, and that the tax of two cents per bushels had been imposed upon them at the moment of the original sale. One-half of the tax being devoted, by the express legislative requirement, to other than inspection purposes, a situation was squarely presented in which an article of commerce shipped from other states, in large quantities, into the State of Maryland for sale was taxed at a fixed rate immediately upon arrival at its destination and concurrently with, if not in effect prior to,⁴ the original sale thereof. The constitutional principles applicable to this situation and the leading authorities in point were discussed by the Appellate Court as follows:

"That the state's power of taxation has been restrained and made subject to limitation by the Federal Constitution, as to certain subjects, is clear, and it is equally clear, that with respect to the mode and manner of exercising the power by the legislature, it has been restrained by the constitution of the state. The ultimate questions for our determination, therefore, are (1) whether the transportation from another state into this state, constitutes commerce within the meaning of the Constitution of the United States; and (2) if it does, then whether chapter 735 is an invasion of the right of Congress to regulate such commerce. But preliminary to these is the question of whether the power to regulate commerce is

³ State v. R. Co., 40 Md. 22.

⁴ Maryland Code, Art. 72, Sec. 10, makes it unlawful "for any packer, commission man or other person to purchase or receive any cargo, or

any part of a cargo of oysters unless a general inspector, measurer or special inspector, shall be present."

⁵ 9 Wheat. 1.

exclusively vested in Congress, or whether it can be exercised by the state when Congress has not exerted its power. In *Gibbons v. Ogden*^{*} it was declared that this power 'comprehends every species of commercial intercourse between the United States and foreign nations,—and among the several states;—that it does not stop at the external boundary line of each state;— and that the grant of this power carries with it the whole subject, leaving nothing for the state to act upon.' In *Robbins v. Taxing District*[†] it was said that 'this power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.—That where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations, indicates its will that the subject shall be left free from any restrictions or impositions, and that any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.—And that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce; such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein, and no discrimination can be made, by any such regulations adversely to the persons or property of other states, and no regulations can be made directly affecting interstate commerce.—In a word it may be said that in the matter of interstate commerce the United States are but one country, and are, and must be, subject to one system of regulations, and not to a multitude of systems.' We have reproduced this passage here, because, while it emphasizes the exclusive power of Congress to regulate commerce in its national character and scope, it also enumerates concisely, but fully, and with unusual precision, the exceptions which are established by numerous decisions of the Supreme Court of the United States. In *Brown v. State of Maryland*,[‡] *Gibbons v. Ogden* was approved, the court saying in that case that 'the power was declared' to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. We deem it unnecessary now to reason in support of these propositions. ' . . . Commerce is intercourse; one of its most ordinary ingredients is traffic; . . . To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. . . . Congress has a right not only to authorize importation, but to authorize the importer to sell.' The appellees contend that 'there is no element of ship-

^{*}120 U. S. 489.

[†]12 Wheat. 419.

ment from other states into this state as an article of interstate commerce, the oysters from Virginia and New Jersey being brought in and mingled with the other property in the State of Maryland, sold here after hawking around from one canning house to another.' But it has been expressly decided that 'only by sale does the article brought from another state become mingled in the common mass of property within the state, up to which time the state has no power to interfere by any action.'

Having decided the act unconstitutional in its application to oysters shipped from other states, the court proceeded to determine the effect of such invalidity as to the tax on oysters caught *within* the State of Maryland, a situation in which no element of interstate commerce could be directly involved. Was it the intention of the legislature to create a tax or charge which would operate on Maryland oysters in a different or more burdensome manner than could lawfully be imposed upon Virginia, New Jersey or Delaware oysters? The court referred to an earlier case,⁹ wherein a tax of two cents per ton was imposed upon all coal shipped from mines within the State of Maryland, whether to points within the state, or to points outside the state. The law had there been held unconstitutional as to shipments outside the state because of the necessary interference with the freedom of interstate commerce. The following extract from the opinion in the former case is then quoted with approval:

"And having thus declared that act so far void (regarding shipments outside the state), as being in conflict with the Constitution of the United States, it becomes a grave question whether the act in its entirety, irrespective of any other constitutional objection, does not fail. As a general rule, where a statute is partly void, and its provisions all relate to a single subject matter, the question whether the other parts shall remain operative, depends in a great measure upon a consideration of the object in view in the passage of the act, and in what manner, and to what extent, the unconstitutional part affects the remainder. Here we can hardly suppose that the Legislature would have passed the act in question with a knowledge that it could only be effectual as to the coal transported to places within the state; and thus intentionally have discriminated against the citizens of the state and in favor of those beyond its limits. It would not be fair to indulge such a presumption with respect to the purpose of the Legislature."

The same argument was advanced by counsel for the packers against the oyster tax in question. Beyond doubt, the Maryland legislature never intended to discriminate between Virginia and New Jersey oysters, on the one hand, and Maryland oysters on the other. *A fortiori*, the legislature did not intend to impose a greater tax upon the latter than upon the former. The obvious purpose of the legislature was to prescribe a uniform charge of

⁹ *Leisy v. Hardin*, 135 U. S. 100. See also *Bowman v. Chicago & C. R. Co.*, 125 U. S. 465; *Lyng v. Michigan*, 135 U. S. 161; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Schollen-*

berger v. Pennsylvania, 171 U. S. 1; *Caldwell v. N. Carolina*, 187 U. S. 622; *Dozier v. Alabama*, 218 U. S. 124.

¹⁰ *State v. C. & P. R. R. Co.*, 40 Md. 22.

two cents per bushel; such purpose would be defeated rather than subserved by collecting the tax upon local shipments and not upon interstate shipments. The law contemplated nothing short of universal application; failing this, there was no warrant in the statute for the imposition of the tax solely upon Maryland oysters. The Court of Appeals—with natural reluctance—recognized the soundness of the argument, and held the oyster tax prescribed by the Act of 1910 invalid not only as to interstate shipments but also as to Maryland oysters. Paraphrasing the language above quoted from the coal case, the court said: "It would not be fair to indulge a presumption that the legislature would have passed the act in question with the knowledge that it could only be effective as to the coal (oysters) transported within the state and thus intentionally have discriminated against the citizens of the state and in favor of those beyond its limits." The decision thus rendered is a plain recognition, by the highest tribunal of a sovereign state, of the exclusive power of the Federal Congress to regulate the subject of interstate commerce which by the consent of the several states has been entrusted entirely to congressional supervision.¹⁰

MARKETS OVERT IN ENGLAND.—A most interesting historical discussion of the "market overt" of the common law is made by an English judge (Scrutton, J.) in a recent case where a pledged watch which had been previously stolen was sold as an unredeemed pledge at an auction room in the City of London. It was claimed by the defendant that the sale was one in market overt, and that the purchaser had thereby obtained a good title as against the real owner. The judge found that the custom of markets overt extended to open shops in the City of London, but that the auction room was not an open shop within the phrase. He says:

"By the common law of England, before it was modified by the incorporation of a rule of the law merchant, a person in possession of goods could not confer on another either by sale or pledge any better title to the goods than he himself had. It followed that if the goods had been stolen even the twentieth innocent purchaser might find himself deprived of them by the original owner. This was old German law as well, but its strictness put a serious fetter upon sales in the great fairs and markets in which much of the mercantile business of the time was transacted. In the eleventh century an early German writer says that "merchants assert that sales made in fairs, whether made with proper legal forms or not, should be binding, since it is their custom." By the foreign customs sometimes the real owner could get his property back by paying the merchant who had bought in a fair the price he had paid for it; sometimes he could not recover it at all, if it had been bought in an open market. In England, by the common law as stated by Bracton," if the person in possession could not produce the person who sold to him to warrant the sale, yet, if he

¹⁰ W. THOMAS KEMP, Baltimore, Md. "F. 151.

bought publicly in a fair or market, though he lost his goods on claim by the true owner, he was free from an action of theft. But in a case in the St. Ives fair roll of 1291, Mathilda Frances was allowed to keep stolen malt on proving that she had bought it in good faith in the precincts of the fair. Gradually by steps which are now, I fear, untraceable, the rule of the law merchant protecting sales in market overt became incorporated as an exception of the strict common law and recognized by the King's courts; and now sect. 22 of the Sale of Goods Act 1893 provides that: "Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." The exception generally only applies to a public legal recognized fair or market. Thus in *Lee v. Bayes*,¹⁸ where a horse was sold by public auction in a horse repository in Southwark, no protection was given to the purchaser, because the sale was not in an open public and legally constituted market. See also *Marner v. Banks*.¹⁹ But local customs might carry the protection further. "The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt." But in some towns their customs may extend the protection to sales outside a recognized market. The City of London is one of these favored localities. No evidence was offered before me of its custom. It was so old and has so often come before the courts that a correct statement of its extent is supposed to emerge from the judicial consciousness of the judges. I am afraid that, left to myself, nothing could emerge of any value, and I am therefore thrown upon the reported cases, and especially upon the case of Market Overt more technically known as the case of the Bishop of Worcester in Hilary Term of 37 or 38 Elizabeth (the reports differ in dates). The bishop prosecuted a felon at Margate, who had stolen his silver bason and ewer, and then demanded the silver from a purchaser who had bought them in a scrivener's shop in the City of London. The case came before the three heads of the common law courts and other distinguished men. Popham, Chief Justice of the King's Bench, has left a report of it;²⁰ so has Anderson, Chief Justice of the Common Pleas.²¹ There is also a report—the longest—by Serjeant Sir Francis Moore,²² and it appears in the 5th part of Coke's Reports, 83b, as *The Case of Market Overt*. The point decided was that the custom only applied to protect a sale of stolen goods in shops which were usual places for the sale of such goods; and it was held that a scrivener's shop was not, as a goldsmith's shop would be, a usual place for the sale of plate. The city by their town clerk tried to claim that the custom was wider, and that each shop was a market for all saleable things, though not usually sold there.²³ I think the custom that emerges from the four reports is that every open sale in a shop or sale in an open shop in the City of London of such goods by the trade of the owner are put there for sale is in the market overt. Omitting the word "open" these are substantially the terms in which Lord Coke states that as Recorder of London he had in some other case certified the custom.²⁴ Lord Coke was Recorder of London in 1591-1592, for six months before he became Solicitor-General, and therefore shortly before this case was heard. A suggestion that I should ask the present Recorder of London to certify the present custom was not cordially accepted by the parties. Lord Coke's Report, however, requires the sale to be "openly . . . so that anyone who stood or passed by the shop might see it." "If the sale be . . . so that one that stood or passed

¹⁸ 18 C. B. 599.¹⁹ 17 L. T. Rep. 147.²⁰ Blackstone, 21st edit. vol. 2, p. 449.²¹ Popham, 84.²² Anderson, 344.²³ Moore, 360.²⁴ Moore's Reports.²⁵ Case of Market Overt, 5 Coke's Reports.

by the shop could not see it, it would not change the property." Nor in the warehouse, "for . . . none would search there for his goods." Popham's Report states the custom alleged as: "That every one of their shops in London are good markets overt," and reports a decision that the custom was too wide; (1) for the shop must be proper for the sale of the article sold, being a place that men will go to to seek for such a thing lost or stolen; and (2) because a private sale in a proper shop will not do—for that the passers-by cannot in reason see it in their passage, distinguishing this from a sale openly in the shop so that everyone passing by might see. Anderson's Report states the custom in the City of London—that each place (*lieu*) in the City of London is an "aperte and open market" to buy and sell things; and decides that the scrivener's shop is not "open *lieu de market*" for plate, any more than a place at the back of the shop not open to the street, or a shop where the windows are "close or shut up." Lastly, Moore's Report states the custom pleaded—that London is an ancient city, and that "*chescun shop est unmarket overt*." The court added the restriction for things usually sold in such a shop, and excluded sales behind curtains, or with shut windows. I think this custom so reported is confined to open sales in shops of goods usually sold there, and that in the time of Elizabeth importance was attached, not only to the sale being in an open part of the shop, but to the sale being visible to passers-by in the street. On the same lines, the learned judgment of Wills, J., in *Hargreave v. Spink*²³ declined to give protection to a sale in a first-floor room over a goldsmith's shop to which the public were only permitted to enter upon escort and by invitation of the shopkeeper, and limited the custom to shops in which goods are openly sold—that is, with an invitation to the public to enter the shop. The custom of London relied upon is in derogation of the common law, and therefore those who rely upon it have to make it out. A custom which takes away one man's property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favored localities. I appreciate that the rule of the law merchant was introduced into the common law; as Coke says: "The common law did hold it for a point of great policy, and behovefull for the Commonwealth, that fairs and markets overt should be replenished, and well furnished with all manner of commodities, vendible in faires and markets, for the necessary sustentation and use of the people,"²⁴ and Blackstone speaks of "that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner should not be afterwards put to difficulties by reason of the previous knavery of the seller." But I do not think this justification of the rule requires or entitles the judges without evidence to extend a stated custom to analogous or similar cases. In *Hartop v. Hoare*, in 1742,²⁵ where it was attempted to extend the custom of the City of London to pawning, the court says: "It is a rule that all customs must be taken strictly and not extended to similar cases." I notice that in that case the court declined judicially to take notice of the custom of London because it was not found; but as in the recent reported cases the court has taken judicial notice of the custom, I have not availed myself of this easy way out of the difficulty. I see no public reason, however, why I should struggle to find these auction rooms within the custom. They are largely devoted to the prompt sale of unredeemed pledges, after a very limited period of public exhibition and very slight description in advertisements and catalogues, and I see no public advantage in the prompt destruction of claims by the real owner to a class of goods that are often dishonestly pawned. I therefore find as a fact that the City Auction Rooms are not a "shop" within the custom of the City of London."

²³ 65 L. T. Rep. 650; (1892) 1 Q. B. 25.

²⁴ Coke, 2 Inst. 713; Blackstone, vol. 2, p. 450.

²⁵ 2 Str. 1187.

INJURY TO TRESPASSER BY FEROCIOUS ANIMAL.—A recent English case on the liability of the owner of land to a trespasser injured by a ferocious animal has been much discussed in the English law journals. The evidence was that L while passing through W's field was attacked by W's savage horse and injured. L had no right to be in the field, which, however, was habitually used by the public as a near cut to a railway station. W knew that the public were in the habit of going into the field and that the horse was savage. The Court of Appeal held W not liable in damages. But the decision has been reversed by the House of Lords,⁵⁴ the ground of its ruling being that notwithstanding that L was a trespasser yet as W knew that persons constantly crossed the field this placed a duty on him to see that they were not exposed to a danger the existence of which they were not warned against. Persons who used the field ought to have been warned of the danger and W was held to be liable as he owed a duty to the public which he failed to discharge. A correspondent in the *Solicitors Journal* attacks the decision with much warmth and some sarcasm. He says he is the owner of a small piece of woodland which contains many brambles, and in the autumn it is much visited by children in search of blackberries, but he now fears he cannot allow this state of things to continue, for if one of these children should scratch its finger in a bramble bush and get blood poisoning, the noble lords might say that it was his fault for not putting up a notice warning innocent children that brambles have spines and would make him pay the doctor's bill. Then again he has sometimes seen people sitting about on his land and heretofore has not interfered with them, but this state of things also seems fraught with peril, for if any of them catch rheumatism the House of Lords could hardly avoid the conclusion, in view of their decision, that he is liable in damages for not putting up a notice that it is dangerous for trespassers to sit on the damp grass. The view of the editor of the *Journal* is that, "it appears to us that the juicy blackberries produced on our correspondent's woodlands, constitute a 'special attraction' to children of tender age, and that the juicy turf and moss under the trees, combined with the retirement of the scene, constitute 'a special attraction' to children of riper age engaged in the pleasing avocation of 'courting.' To each of these classes we fear the admirably drafted warning will prove futile—merely 'idly forbidding trespass,' as Lord Macnaghten said in the last-mentioned case—and if our correspondent chooses to keep on his land the attractive features above mentioned, he will have to bear the consequences. To avoid them he will apparently have to stub up his brambles, and either to dig up his patches of grass and moss, or to have tarpaulins completely spread over them."

⁵⁴ *Lowry v. Walker*, 130 L. T. 54.

KEEPING A DOG PROHIBITED BY INJUNCTION.—A New Jersey Court of Chancery has granted an injunction at the suit of several residents against a neighbor, restraining him from keeping a ferocious dog. It was shown that the owner refused to adopt suitable measures to prevent the dog from escaping from his yard, and the complainants were in danger of being attacked whenever they went out of their homes. The dog was ordered by the city to be killed, but the execution of that order was prevented by a writ of certiorari. The Court of Chancery holds that, although it is lawful to keep a vicious dog, it is not lawful to keep him in such a manner that neighbors are unnecessarily exposed to danger, saying: "It is no less a nuisance for a neighbor to keep a vicious dog without appropriate restraint and in such manner that the dog can and will escape and inflict bodily harm than it is for such neighbor to conduct a lawful business in such negligent manner as to endanger the health of residents in the vicinity."⁶⁰

AN UNDERTAKING SHOP A NUISANCE.—In a recent Washington case it was ruled that an undertaker's place of business was a nuisance, though it was shown that he maintained every sanitary precaution known to the profession and operated his establishment in a legitimate manner. The plaintiff who asked for an injunction, complained that noxious odors and gases, arising from the deodorants used, would permeate their homes, and that there was danger of infection from the proximity of the morgue and the possibility of flies passing from one place to the other. The Supreme Court holds that the establishment is not a nuisance *per se*, but that it would be manifestly unfair to grant injunctive relief only in cases where the object was a nuisance *per se*, when other circumstances intervene which tend to destroy repose and comfort. It grants the injunction, saying:

"In this case the element of comfort and repose in the enjoyment of the home becomes an essential element of our inquiry; for it is not only shown by the evidence, but it may be accepted as within the common knowledge of man, that the immediate presence of those mute reminders of mortality, the hearse, the chapel, and taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling house where the family sleep and eat and spend their leisure hours, autopsies are going on, that the dead are there, cannot help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance, and rendering him more susceptible to contagion and disease."⁶¹

ILLEGAL BALLOTS AT A LOCAL OPTION ELECTION.—In their zeal for their cause the advocates of temperance in the consumption of liquors are very often very intemperate themselves. An amusing instance of this appears in a recent Kentucky case.⁶² At a

⁶⁰ Rider v. Clarkson, 78 Atl. 676.

⁶¹ Conley v. Hardwick, 132 S. W.

⁶² Densmore v. Evergreen Camp, 132.
112 Pac. 258.

local option election in Powell County, Kentucky, on each of the ballots used there was placed over the word "Yes" (the local option side) an open book, with the words "Holy Bible" printed across its face, and over the "No" (the side opposed to local option) a whisky bottle and a glass beside it, with the head of a snake protruding from the mouth of the bottle. A number of voters testified that they voted "dry" because they could not go against the Bible. One negro said: "I had to vote under the Bible; the Lord God Almighty would strike me dead if I hadn't." Other evidence was introduced that one of the clerks of election said to the negro voters, as they approached: "If you want to go to hell, vote under the snake; if you don't vote under the Bible." The Court of Appeals of Kentucky holds that a ballot is a means devised by law to secure a fair expression of the will of the people, and it should never contain devices that give to one side an undue advantage over the other. In this case the device used gave to those favoring prohibition the sanction of the word of God, while it held up to those on the other side all of the unspeakable horrors of delirium tremens. Since the use of the emblems materially affected the result of the election, they were improper and absolutely inexcusable, and rendered the election invalid.

CORPORATION CANNOT PRACTICE LAW DIRECTLY OR INDIRECTLY.—In a recent case in New York an action was brought on the following agreement under which the defendant agreed to pay thirty-three per cent of the amount recovered.

"In re Opening Blackwell's Island Bridge.

"I do hereby retain and employ the Realty Protective Company to act for me and in my behalf in the conduct of certain proceedings affecting my property, and to furnish such *legal and other expert services as it may deem necessary* in connection with the taking of my property by condemnation proceedings. . . ."

The Supreme Court holds the agreement void, saying:

"It is settled that a corporation cannot practice law, either directly or indirectly, by employing lawyers to practice for it." The said respondent disclaims that it is practicing law, but it is impossible to construe said instrument except as a retainer to represent the said Bowsky in legal proceedings and to furnish legal services therein, in consideration of which it was to receive one-third of the recovery. It was therefore illegal upon its face. Moreover, we think it was illegal for still another reason. By it the respondent was retained to furnish legal 'and other expert services.' The only other expert services which could legitimately have been rendered in the proceeding were services of expert witnesses. No one would contend that an agreement to pay an expert witness one-third of the recovery was valid. An agreement to pay a corporation one-third of the recovery for furnishing expert witnesses is no less objectionable." The said respondent filed an affidavit in which it is stated that it employed and paid an attorney to represent the interests of said Max Bowsky; that it em-

"Matter of Co-operative Law Co.,
198 N. Y. 479.

"Lyon v. Hussey, 82 Hun. 15.

ployed and paid experts to appraise the property, several of whom testified in the proceedings as to the value of the machinery and fixtures, and that before the appointment of commissioners it 'performed various services before city boards and officers and conferred with the various city officers having jurisdiction over the initiatory and preliminary steps in the acquisition of the interests to be taken.' It is also asserted that an owner with small interests derived an advantage from placing his matter in its hands that could not be obtained in the hands of a private attorney. It does not, however, specify the nature of the mysterious services rendered in conferring with city officers or how any legitimate advantage is derived from employing it instead of a reputable attorney. Certainly no legitimate services can be rendered before the city determines to acquire the property. Thereafter the question is purely one of appraisal or assessment of damages. The assertion by the respondent of some peculiar and invisible means of enhancing awards is of itself sufficient to show that such an agreement as that relied upon, by which a corporation is retained to furnish legal and other expert services in condemnation proceedings for a percentage of the award, is against the public interest."¹⁹

INJURY TO PASSENGER—CANCER CAUSED BY BRUISE PROXIMATE RESULT.—In a recent Kentucky case it was ruled that where a woman was injured in the breast by an umbrella handle in falling from a street car, and her original petition, filed ten months thereafter, only claimed damages to her head and arm, and three months later her amended petition set up tumor and injury to her breast, and she died of cancer of the breast, there was sufficient to go to the jury on the question whether the fall was the proximate cause of the cancer. The court said:

"The testimony of the physicians introduced on her (plaintiff's intestate's) behalf was to the effect that 15 per cent of cases of cancer of the breast may be traced back to a traumatic injury; that the cause of cancer is unknown, and that it is not known that the injury in these cases was the cause of the cancer. But the physicians gave it as their opinion that in a glandular structure like the breast, where the circulation is very extensive, there are what are called embryonic cells, and that a bruise would start an embryonic cell to growing and develop into a growth different from the original growth; that falling from a street car and having an umbrella punched into her breast would be a sufficient or probable cause for the condition in which they found her; that the injury would not cause the cancer, but it might bring about a condition which would result in it when a cancer would not have otherwise existed; that any chronic inflammatory condition in the breast was liable to bring about such a condition, and that a great percentage of the tumors of the breast in women took on at some time malignancy. These physicians stated facts sustaining the view which they advanced, and the defendant offered no contradictory evidence. The proof for the plaintiff was to the effect that she was a strong, healthy woman, without an ache or a pain until her injury; that after this she was never without pain, and the severity of her sufferings, as well as their constancy, tends strongly to confirm the conclusion of the physicians that the malignant cancer was the result of the bruised condition of the breast which she received in the fall. At any rate, there was sufficient evidence on this point to go to the jury."²⁰

¹⁹ Re New York, 45 N. Y. L. J. 441.

²⁰ Louisville R. Co. v. Steubling, 136 S. W. 634.

WORKMEN AND CLASS LEGISLATION.—An Illinois statute passed in 1907 makes it unlawful to influence or engage workmen to change from one place to another in the state or bring workmen into the state by means of false representations concerning the character of the work or as to the existence or non-existence of a strike. Another section makes one guilty of a felony who hires persons to guard with arms any property without written permit from the governor, and gives any workman induced to engage in service with the persons mentioned a right of action for damages sustained because of the false representations, including reasonable attorney's fees.

The Supreme Court holds the statute unconstitutional because it imposes upon employers of workmen coming from another place to their place of employment a different measure of liability, both civil and criminal, for their wrongful acts than imposed upon others, the distinction not being justified under the police power. The court says:

"The legislature may in the exercise of the police power classify persons if the classification is based upon some reasonable distinction having reference to the object of the legislation, but there can be no discrimination in legislation unless there is an actual difference of condition. The class to whom this act applies is workmen changing from one place to another. The representations aimed at are those which concern the kind and character of the work, of the compensation, the sanitary and other conditions of the employment and the existence of a strike or other labor trouble. These conditions or some of them are as important to the stenographers in an office, the clerks in a store or a bank, the teachers in a school or any of the professional or semi-professional people who are employed by others as to the workmen mentioned in the act. They are as important to the workman who does not leave his home for employment as to him who does. If persons entering into contracts of employment may be placed upon a different footing from persons entering into other contracts in the manner provided in this act it can be only by an act sufficiently comprehensive to include all persons subject to the evil aimed at—the deception of employees as to the terms, character and conditions of their employment. A strike might exist among the telegraphers of a city, but the employer would not violate this statute if he employed other telegraphers without notifying them of the strike. A tailor shop might be unsanitary, but the employer would not violate this statute so long as he employed only resident tailors. A statute cannot be sustained which applies to some cases and does not apply to other cases not essentially different in kind. This statute is an arbitrary enactment, not operating equally on all persons under like conditions, but special in its operation, and it is therefore violative of constitutional rights."²²

A SERMON TO LAWYERS IN OKLAHOMA.—The Court of Appeals of Oklahoma in a recent opinion calls upon the bar of the state to dignify the practice of the law especially in criminal cases, and reads a sermon to them which it is a pleasure (for an out-

²² *Josma v. Western Steel Co.*, 94 N. E. 945.

sider at least) to read, because it shows a genuine and conscientious effort on the part of the supreme tribunal of this young state to elevate the standard of the profession. Says the court:

"We fully indorse the statement made by Hooker when he said: 'Of law no less can be acknowledged than that it has its seat in the bosom of God; its voice is the harmony of the universe; all things in heaven and on earth do it reverence; the weakest feeling its protecting care, the mightiest not being exempt from its power.' This being our ideal, we are trying to place the practice of criminal law in Oklahoma upon a dignified and honorable basis. There is no good reason why it should not be as reputable as the trial of civil cases, and we are determined that in Oklahoma it shall be. The standard of professional honor must be as high in Oklahoma as it is in any other state of the Union. We will not be satisfied with or tolerate anything less. In every volume of our published reports we have announced that lawyers should try their cases upon their actual merits, and should act with perfect fairness toward the courts and opposing counsel. We now go further and give 'fair warning' that if there are any members of the profession in Oklahoma who are not disposed to heed this friendly admonition they will consult their own interest by removing from the state if they desire to escape disbarment proceedings and keep out of the penitentiary. No lawyer has any right to make a criminal out of himself in order that he may succeed in the trial of any case. No lawyer will be permitted to enjoy any benefits arising from illegal or unfair conduct on his part if we can possibly prevent it. We earnestly request all trial judges in the state to rigidly pursue the same course, it matters not who the attorneys may be. The trial judges cannot do the state and the profession a greater service than by aiding this court in putting a stop to unprofessional conduct upon the part of attorneys, and by assisting this court in ridding the state of such characters. This must be done before justice in its purity can be administered. Some lawyers act as though they thought because Oklahoma is a new state that they can do as they please and that any kind of conduct will be tolerated. In this they are greatly mistaken, as some of them will discover to their sorrow if they do not heed our admonition. Lawyers should be held more strictly accountable for their conduct than any other class of people for two reasons: First, their opportunities for wrongdoing are greater; second, they are the sworn officers of the courts, and are therefore under double obligation to act honorably with the courts and with all men. A tricky and dishonest lawyer is a most dangerous member of society, and he brings the profession of law into disrepute. Law is an honorable profession, and the most of the lawyers are honorable men, and it is the duty of the courts to protect society and the profession itself against unworthy men."²⁸

REGULATING THE POSSESSION OF OPIUM.—The Supreme Court of California has affirmed the constitutionality of a state statute which makes it unlawful for any person to have in his possession "any cocaine, opium, morphine, &c., or any preparation thereof containing more than two grains to the fluid ounce, except upon the written order or prescription of a physician, dentist or veterinary surgeon licensed to practice in this state, or unless such possession is that of a jobber, wholesaler, manufacturer to pharmacies, retail pharmacy, physician, dentist or surgeon licensed

²⁸ Crawford v. Ferguson, 115 Pac. 278.

to practice in the state." The law, it says, is not an infringement on the rights of liberty and property as guaranteed by the fundamental law. The discretion of the Legislature in the employment of means which are reasonably calculated to protect the health, morals or safety of the public is very great, and so long as it does not infringe upon the inherent rights of life, liberty and property, either directly or through some limitations upon the means of living, or some material right essential to the enjoyment of life, its determination is conclusive upon the court. The object and purpose of the act is to so regulate the possession, sale and disposition of a dangerous yet useful drug as to prevent the weak and unwary from using it for their own physical and mental ruin, and to the serious injury of the general public, and violates no constitutional right."

The court cites a similar Oregon case²⁶ and also the act of Congress of 1909, which prohibits the importation and use of opium for any other than medicinal purposes, and makes the mere possession of this drug sufficient evidence of a violation of the act unless satisfactorily explained to the jury. The court states that the vice of using opium is on the increase in this country, and its indiscriminate use "would have a very deleterious and debasing effect upon our race."

One point made against the validity of the statute was that in a number of cases it has been held that although the sale of alcoholic liquors may be regulated or even prohibited, mere possession of them could not be made a crime. As to this the Supreme Court says:

"In distinguishing the case from those in which it had been held that the mere possession of intoxicating liquors cannot constitutionally be made a crime, the learned judge below in the foregoing opinion uses this language: 'It appears that there is no such thing as moderation in the use of opium. Once the habit is formed the desire for it is insatiable, and its use is inevitably disastrous.' We do not understand this to have been intended to declare an established or conceded fact. So interpreted the expression would be perhaps unduly sweeping. But the validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. If the belief that the use of opium, once begun, almost inevitably leads to excess may be entertained by reasonable men—and we do not doubt that it may—such belief affords a sufficient justification for applying to opium restrictions which might be unduly burdensome in the case of other substances, as, for example, intoxicating liquors, the use of which may fairly be regarded as less dangerous to their users or to the public. Assuming, as we must, that the legislature acted upon some such view, the restrictions upon the right to possess the drugs named in the act cannot be said to be clearly unreasonable or unnecessary for the protection of the public from evils against which the legislation in question is aimed."²⁷

²⁶ Luck v. Sears, 29 Oreg. 421.

²⁷ Ex parte Tum Quong, 114 Pac. 835.

THREATS AS UNPROFESSIONAL CONDUCT.—In two states within recent months members of the bar have been suspended or disciplined for writing threatening letters in the interest of their clients. In the New York case the attorney's purpose was to obtain the surrender of incriminating letters and he threatened the holder of them that if they were not given up he would publish incriminating letters written by the person addressed and other threats of exposure of misconduct were also made. The court said that the "methods thus adopted by respondent to accomplish his purpose, however innocent that purpose might have been, were absolutely and wholly unjustifiable. If the same threat had been made with a view to extorting money, whether for the benefit of the respondent or of his client, it would have no difficulty in finding respondent guilty of an attempt at blackmail. They were not made with a view to extorting money, and he was not therefore guilty of a criminal offense; but from a professional point of view it is as culpable to use threats to obtain possession of incriminating papers as it is to extort money."³⁰

In the South Dakota case, it was held that where an attorney for a deserted wife wrote letters to the husband implying that if he did not pay certain money and turn over certain property to the wife, and induce his paramour, with whom, it was claimed, he was living in another state in adultery, to secure the dismissal of certain civil proceedings on a note given by the husband to such paramour, criminal proceedings would be instituted against them and they would be extradited and tried, such attorney might be criminally punishable for extortion within the statutes of South Dakota, without reference to the justness of the wife's claim or the attorney's intention, and that the latter should be subjected to professional discipline.³¹

As pointed out by the New York *Law Journal*,³² in both cases the offense was committed not for the attorneys' own direct benefit, but was due to excess of professional zeal, and the penalty inflicted both in the New York and South Dakota cases was the same, to-wit, suspension from practice for six months. These decisions illustrate the necessity for careful consideration in determining how far an attorney may legitimately go in writing letters in the nature of threats in his client's behalf. Of course the ordinary communication that a lawyer sends that an action will be brought unless his client's claim is paid is, strictly speaking, a threatening letter. It is commendable and not reprehensible professional conduct thus to give a debtor opportunity to settle without suit. On the other hand, direct or indirect threats of criminal proceedings or of exposure to disagreeable notoriety, are not legitimate means of coercion.

³⁰ Re Chadrey, 114 App. Div. 458.

³¹ Re Sherin, 130 N. W. 761.

³² Vol. 45, p. 514.

LEGAL EDUCATION IN THE NEW CANADIAN PROVINCES.—When our western territories were organized into states little attempt was made to provide standards of legal education for admission to the bar and in one state at least—Indiana—the constitution provides that every person of good moral character shall be entitled to practice law if he desires. But in the new Canadian provinces of the West, they are starting with the same high standards of the older provinces. In the Province of Saskatchewan for example, one to be allowed to begin the study of the law must be 16 years of age at least; and either be a graduate in arts or law of a recognized university in the United Kingdom or Canada, or have passed the matriculation examination of some one university empowered by law to grant the degree of Bachelor of Arts in the United Kingdom or Canada, or have passed the junior matriculation examination of the Education Department of Saskatchewan; and lodge a testimonial of good character. He must then “perform due service as clerk under articles of clerkship with an enrolled solicitor who is in actual practice within the province” for 5 years, or (if a graduate in arts or law) 3 years. He has during his term to pass three examinations at an interval of eleven months between each. No law school being yet established in the province, the examinations are upon the statutes and prescribed text-books. The fee for enrolment is \$100. A barrister or solicitor in England or Scotland or Ireland (including a law agent or writer to the signet in Scotland) or in any province or territory in the Dominion of Canada or in any other British Colony, may be enrolled as a barrister and solicitor of Saskatchewan upon passing an examination in the Statutes of Canada, the Ordinances of the Northwest Territories, the Statutes of Saskatchewan and the practice of its courts, and upon paying an enrolment fee of \$400.

RECENT AUTOMOBILE LAW.—The automobile is helping to occupy a considerable space in the current law reports and digests, and two treatises on automobile law have been published within the past year. Among the recent cases of interest are the following. In Washington, the plaintiff was crossing one of the main streets of the city of Seattle when he was negligently run over by an automobile driven by the superintendent of the street department, who was at the time engaged in the performance of his duties as such superintendent. The city contended that, conceding the doctrine that cities are responsible for the safe condition of the street, such implied liability is limited to structural defects or some inert obstruction and does not reach to damages that flow from moving vehicles or objects controlled by human will or direction, but the Supreme Court of Washington was of a different opinion, and affirmed the plaintiff's judgment.¹ In Ohio it is

¹ *Hewitt v. Seattle*, 113 P. 1084.

held that one who intentionally violates the statute prohibiting the driving of an automobile beyond certain speed on the streets of a municipality, and in so doing runs into, strikes and injures a person rightfully passing upon or across the street, is guilty of assault and battery, notwithstanding the injury was unintentionally inflicted. There are no common law offenses in Ohio and the code defines assault and battery as "unlawfully assaulting, threatening, striking or wounding another."² In Minnesota, the plaintiff was a young woman 24 years of age, accustomed to farm work in and out of doors, and to driving horses on the farm and highway, and to meeting automobiles. One day in May she was driving a single buggy drawn by a gentle horse along a country highway, when at a distance of some eighty rods she saw the defendant standing by his automobile on the highway. He was on his knees, looking at the machine. Two young ladies were standing near it. The plaintiff, not having any reason to anticipate trouble in passing the stationary automobile, kept on her way, and when opposite the machine defendant, without giving any warning, suddenly started his motor, which caused the usual and familiar nerve-wrecking noise made by an automobile when cranked. The horse was frightened and whirled to the left, throwing plaintiff into the ditch and seriously injuring her. The lower court, on motion, dismissed the action on the ground that the evidence showed no negligence on defendant's part. The Supreme Court of Minnesota agrees with the trial judge that defendant had a right to stop his automobile for a reasonable time to adjust it, and that the mere fact of starting it was no evidence of negligence; but this was not the negligence charged in the complaint, which alleged that the automobile was suddenly set in motion without warning to the plaintiff. The court holds that the failure to warn plaintiff of his intention to start the motor is the gist of the cause of action, and that this negligence was a question for the jury. The lower court having erred in not submitting the case to the jury, a new trial was granted.³ In New York it is held that a *prima facie* case of the operation of an automobile by defendant at the time of an accident may be made out by proof that it displayed a certain license number which was registered in the office of the secretary of state in the name of the defendant. Nevertheless a finding that defendant owned and operated an automobile involved in an accident based on the testimony of one witness that the license number on the automobile involved was the same as the registered license number of defendant's automobile is against the weight of evidence where it is contradicted by the fact that the description of the machine involved is different from defendant's, and by the testimony of four disinterested witnesses that the defendant's machine at the time of the accident

² *Fishwick v. State*, Ohio Law Bul., Dec., 1910.

³ *Fisher v. McGrath*, 128 N. E. 579.

was at a place many miles away from the scene of the accident.* In North Carolina a doctor's chauffeur, disregarded his instructions to put the automobile in the garage, and at about 12 o'clock one night went out for a spin with his chums, whom he met at a "blind tiger." The automobile, going at a rapid speed, thirty-five or forty miles an hour, and wobbling from side to side, soon struck a horse and buggy, threw out the occupants, but fortunately without serious injury, and was itself badly wrecked. The defendants were sentenced to imprisonment for five years. This sentence was upheld by the Supreme Court of South Carolina. Criminal conspiracy to use the automobile of another without his consent was one of the counts under which defendants were found guilty. The court holds that a criminal conspiracy is not restricted to unlawful acts which affect the community or public, as distinguished from the individual, a conspiracy being a combination of persons to accomplish a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means.⁵ In Washington the owner of automobiles for hire kept them standing in front of a hotel in charge of chauffeurs. A chauffeur while on duty took from the hotel a telephone girl working there to her home without collecting fare. On his return to the hotel the chauffeur injured a pedestrian. It was held to be shown *prima facie* that the chauffeur acted within the scope of his employment so as to render the owner liable to the pedestrian for the injuries received, and that the testimony of the owner and the chauffeur that the owner had instructed his chauffeurs not to take the telephone girls home in automobiles, unless instructed so to do by the owner or on payment of fares, and that the chauffeur had not been instructed to take the telephone operator home on the occasion, did not as a matter of law overcome the *prima facie* case, but the question whether the chauffeur acted within the scope of his employment at the time of the accident was for the jury.⁶ In Massachusetts it is held that a restriction in a deed executed in 1899, that "no stable of any kind, private or otherwise, shall be erected or maintained on any portions" of the land conveyed was not violated by the building of a garage on the land, the court saying that while "it is true that in the *Standard Dictionary*, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the *Standard and Century Dictionaries* a garage is defined as 'a stable for motor cars' and 'a building, as a stable, for the storage of automobiles or other horseless vehicles,' we nevertheless think that the word 'stable,' as commonly used and understood at the time of the imposition of those restrictions. * * * carried the idea not only of a building but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning

* *McCann v. Davison*, 45 N. Y. L. J. 1682.

⁵ *State v. Davis*, 70 S. E. 844.

⁶ *Kneff v. Sanford*, 115 P. 1040.

it runs with the goods? And why should the manufacturer not be liable? The answer of defendant's counsel to this question is: 'Because there is no privity of contract between the advertiser and the purchaser who buys of a third party.' But is this so? Is it not a familiar doctrine that an offer of a reward may be made to all the world by advertising, and that he who performs the conditions is held to have accepted and completed a binding contract? In the famous English 'Smoke-ball case,'¹⁰ defendants, who were proprietors of a medical preparation called 'The Carbolic Smoke Ball,' issued an advertisement in which they offered to pay £100 to any person who contracted the influenza after having used one of the smoke balls in a specified manner and for a specified period. Plaintiff, on the faith of the advertisement, bought one of the balls and used it in the manner and for the period specified, but nevertheless contracted the influenza. The Court of Appeals unanimously held that these facts established a contract by the defendants to pay the plaintiff £100 in the event which had happened. What is the essential difference between the promise of the defendant in that case and the promise of the defendant here? When the Pope Motor Car Company said in their catalogues which were distributed to the public for the purpose of inducing the public to buy their automobiles, 'The new type X Pope Toledo is a high-grade car, capable of all that is required of large touring cars, and developing 24-horse-power,' were they not in effect saying, 'If you,'—that is, one of the public, as yet not ascertained—'will buy our car, we will warrant it to run and do all that is required of large touring cars and to develop 24-horse-power.' And when plaintiff went to the only place in his city where he could buy this car and paid a dealer \$3,000 for it, did he not accept the offer thus made and complete a contract which is binding on the Pope Company? This is exactly the reasoning of Smith, L. J., in the 'Smoke Ball case.' In a note to *Pemberton v. Dean*, 88 Minn. 600, in 60 Law Reports Annotated, p. 311, it is said 'The above case is one which seems to have no exact precedent. The effect of a manufacturer's warranty remaining on an article when sold by a dealer does not seem to have been hitherto brought in question.' Why should the manufacturer not be responsible for his express warranty in whatever manner he has caused it to be placed in the channels of open trade with the design that it shall reach the purchaser? It is a familiar rule that it is not essential to a warranty that the representations shall have been made directly to the buyer; if they are made to a stranger and by him communicated to the buyer, so as to become the basis of a purchase by the latter from the party originally making the representations, they are regarded as having been made directly to the purchaser."

WHO IS "HEAD" OF THE FAMILY.—In the opinion of the Court of Appeals of Georgia, the husband cannot be ousted by his wife from the position of head of the family in law even though he has been in fact. A man being charged with being drunk "in the residence of Ed Scott," Mrs. Scott appeared and testified that it was her house, that she paid the rent and that she was the head of the family. But the court said that this could not be, adding:

We have observed many instances in which actually the wife was the head of the family, but legally it cannot be conceded that such a case exists. We have no doubt, from the record in this case, that Ed Scott's title to be called the head of the family depends solely for its existence upon the law. Perhaps any effort on his part to exercise any of the prerogatives of superior authority given him by law would subject him to prompt and humiliating subjection at the hands of his wife, who swears that she is the head of the family. These may be the facts as they really

¹⁰ *Carlill v. Carbolic Smoke Ball Co.*, Q. B., 1893, vol. 1.

both named Meribaal (II Sam. xxi, 7 et seq.). Instead of repeating the same name, however, it seems to have been the custom to make use of one of the elements of the family name; thus Ahitub has two sons, Ahijah and Ahimelech. Three of Saul's family have the element ba-al (changed to "basheth") in their names. As a consequence of this avoidance of repetition a single name was as a rule sufficient to identify a person, and it is only in the later stages of Hebrew tradition that it was found necessary to give the name of the father in order to identify the son, as for instance, in the case of Jaazanih-ben-Shapan (Ezek. viii, 11). As the Jews spread throughout the land bordering the Mediterranean, they drew upon other languages for their personal names while still retaining Biblical ones. These new names so adopted became popular in Italy, Persia, Arabia, and Turkey. As a consequence certain names became characteristic of certain districts, some of the older names were revived, and the most striking tendency of the post-Talmudic period is the general choice of local names by the Jews for their civic relations. This led to the adoption of two names, one for civic purposes and the other for the use of Hebrew documents. In 1787 an order was issued by the Austrian Empire which compelled Jews to adopt surnames, though their choice of given names was restricted mainly to the Biblical ones. Commissions of officers were appointed to register all the Jewish inhabitants under such names. If a Jew refused to select a name the commission was empowered to force one upon him. This led to a wholesale creation of artificial surnames, of which Jewish nomenclature bears the traces to the present day. Napoleon also, in a decree of July 20, 1808, insisted upon the Jews adopting fixed names. While various governments thus forced the Jews to adopt surnames, they were at the same time inclined to limit their freedom in the selection of given names. In Bohemia the provisions of the law which was passed in 1787 restricting them to Biblical names were not rescinded until August 11, 1836. The Prussian government in the same year attempted to introduce a similar restriction in that state, which led to Zung producing his classical monograph, "Die Namen der Juden," in which he showed from examples taken from all periods that the Jews had freely adopted the current and popular names of their neighbors in all parts of the globe. Owing mainly to this "tour de force" the exactment was not pressed. Similar rules have been passed by the Russian government from time to time, but without producing much effect, though even at the present day a Jewess must not bear such a name as Clara. Nicknames seem not to be so frequently adopted among Jews. Instead of nicknames modern Jews use contractions of Hebrew descriptive names (Jewish Ency., vol. 19)."

The court refers at length to *Smith v. Casualty Co.*,¹³ a case which has been heretofore discussed in the REVIEW.¹⁴

LAW REFORM—ANOTHER APPELLATE COURT DECISION.—We have to add to those referred to in a recent number,¹⁵ another decision of an appellate court in a criminal case which treats technicality as subordinate to right and justice. The appellant had been convicted of murder in Chicago and had appealed to the Supreme Court of Illinois. The opinion of the Appellate Court first examines in fullness the testimony and points out the overwhelming proof of guilt. It then takes up the errors alleged. The principal one was the trial judge's improper action in granting the prose-

¹³ 197 N. Y. 420.

¹⁴ See *ante*, vol. 45, p. 115.

¹⁵ *Ante*, p. 267.

cution's request to call three witnesses as the court's witnesses, and in then letting them be cross-examined by the prosecution vigorously and irrelevantly, the cross-examination tending to emphasize the defendant's conduct in performing abortions and otherwise to exhibit his moral character in a damaging light. This error, the court concedes, was so "grave and substantial" that it would "not only justify, but would require the reversal of a judgment in any case, if there was any doubt whatever about the guilt of the accused." But, the court then continues: "The question then arises whether it is the duty of this court to reverse the judgment, or to affirm it on the ground that the guilt of the defendant was so conclusively established by competent proof that the judgment should be affirmed notwithstanding the errors committed. After much deliberation, we have concluded that, as we cannot say that upon competent evidence there might be a doubt as to the defendant's guilt, we would not be justified in reversing the judgment on account of the errors committed. We cannot escape the conclusion that *the verdict could not have been otherwise than 'guilty' even if none of the errors referred to had been committed.*"¹⁶

Dean John H. Wigmore in commenting on this decision,¹⁷ says:

"It reaches the high-water mark of modern aspirations in its treatment of procedural 'technicalities.' Those supreme courts which have not yet seen their way to the practical application of the highest principles of criminal justice may well take notice of this opinion, and learn from it. This is all that the most radical critics have asked for in the attitude of our supreme judiciary. The emphatic thing is the *method* of treating the issue. The way not to do it is to let the whole result turn on the observance or non-observance of a rule of procedure. But the way to do it rightly is to regard the rule as a means to an end, and to ask whether that end has been attained after all, in spite of the rule. The reproach to so many American Supreme Court decisions of past years has been that they never show even a passing consideration of the main issue, viz., whether the trial demonstrates that a guilty man has been found. The merit of the present decision is that it considers primarily this issue. That courts should make a practice of this attitude would be the most fruitful sign for our criminal jurisprudence of the future.

"Moreover, in this opinion, the principle is so stated as to be free from the shortcomings of most of the recent attempts at stating it. The opinion asks as the test for its judgment, whether 'the verdict *could* have been otherwise than guilty, if none of the errors had been committed,' i. e., whether on this testimony the jury, if doing its duty, could have found a different verdict. Many courts have phrased it, 'whether the jury *might* have found a different verdict.' This leaves it open to mere speculation; it is easy to suppose what they *might* have done. In asking what they could have done consistently with their duty, the jurors are kept within the revising scrutiny of the court, and if the testimony is in the court's opinion conclusive the verdict stands as in justice it should. The Illinois Supreme Court in taking this attitude stands as a model for the courts of this country in the administration of the criminal law."

¹⁶People v. Clemenson, 250 Ill. 135;
95 N. E. 157.

¹⁷6 Ill. L. R. 267.

INTERNATIONAL CONGRESS ON AERIAL LAW.—An International Congress on Aerial Law was held in Paris during the summer. France, England, Italy, Germany and Switzerland were represented, but not America, either North or South. A series of resolutions were adopted from which it is expected to develop in the future an aerial code. It may be noted that a motion to forbid the use of explosives by air ships in time of war, which was made by a delegate from England, was rejected after speeches against the proposition by the French and German delegates. The following are the resolutions adopted:

Chapter 1.—General Principles of Aerial Navigation (Circulation).

Art. 1. Aerial navigation is free save for the rights of the states subjacent (*sous-jacents*) to take measures to ensure their proper security and that of the person and the goods of the inhabitants thereof.

Chapter 2.—Concerning the Nationality and the Registration of Aeroplanes.

Art. 2.—Every airship must have a nationality, and one only.

Art. 3. The nationality of the airship is that of its owner. If the airship is owned by a company, the nationality shall be determined by the place of the headquarters of such company. In case of different nationalities of different co-owners of the airship, the nationality shall be that of those who own two-thirds of the value of the airship.

Art. 4. Every airship must carry a distinctive mark of its nationality.

Art. 5. Every airship must carry on board a descriptive document containing particulars necessary to distinguish it (*propres a individualiser*).

Art. 6. Every proprietor of an airship before being allowed to make an ascent or circulate (*mettre in circulation*) beyond private aerodromes must have obtained from the public authority the inscription of this airship in the register of matriculation kept by the authority competent (for that purpose). Each State shall regulate the registration of airships within the limits of its own territory.

Art. 7. Every airship must carry a distinctive mark indicating the place of its registration.

Art. 8. The registers shall be published.

Chapter 3.—Concerning Landing.

Art. 9. Airships can land on property not inclosed.

Art. 10. It is forbidden them, except in the case of *force majeure*, to land: (a) Upon fortified works and in the neighborhood of such works in the radius determined by the military authority; (b) In the interior of agglomerations (a group of small towns or villages forming one municipality), exception being made in regard to places designated by the public authority.

Art. 11. Every landing carries with it the obligation to repair any damage effected. However, should there be blame on the part of the victim, the author of the damage shall be, in proportion to this blame, discharged in all or in part the reparation which would otherwise be incumbent upon him.

Chapter 4.—Concerning Jettison.

Art. 12. *Le jet* consists in every voluntary casting overboard of objects, bodies, or materials of whatever kind.

Art. 13. Save in the case of imminent peril, the casting overboard of all things calculated to injure either persons or property is forbidden.

Art. 14. In every case the damage done is (*prima facie*) a matter for reparation.

Chapter 5.—Concerning Wrecks.

Art. 15. Anyone finding the whole or a part of an airship disabled or abandoned should notify the fact to the competent authority.

Art. 16. The competent authority duly notified shall at once take the necessary steps to assure the conservation of the wreck and the discovery of the owner.

Art. 17. The owner of the wreck must claim it from the authority who has taken charge thereof within a year from the date of the demand, paying the costs incurred in guarding it. Moreover, he must pay the finder a premium for the discovery calculated at the rate of 10 per cent. upon the value of the wreck at the date of its being handed over.

THE RIGHT TO FLY IN GREAT BRITAIN.—The aviation act, which was recently passed into law within a fortnight of its introduction, is, we believe, the first attempt by the legislature of any of the great states to control the right of flying. It was enacted primarily for the purpose of protecting the processions in connection with the coronation from the danger of reckless aviators who might have caused a disaster parallel to that which took place in Paris a month ago. But its scope gives the home secretary the largest possible powers of interdicting flying over any area, wherever and whenever he thinks fit to exercise them. He has already shown by the orders issued since the coronation that he does not mean to let his powers become a dead letter, and that the state's control over the new means of locomotion is to be a real thing. Those interested in flying may, perhaps, consider it fortunate that he did not choose to prohibit the flight over England which has been made this week by a number of foreign aeronauts. Certainly the attitude taken up towards the new invention in England is diametrically opposite to that which obtains in most continental countries. Here we are anxious primarily for the safety of the public; there they are anxious above all to encourage the daring aviator. Here we lay stress on state sovereignty and private property; there they are working to secure a free domain for the individual flyer. The contrast was markedly emphasized at the recent conference of the International Legal Committee of Aviation, which was held at Paris. The English delegates stood out for the state sovereignty of the air which enables it to control flying within the territorial jurisdiction; but the rest of the conference approved of a principle that circulation in the air is free, saving the right of the subjacent states to take certain measures to ensure their security and that of their subjects. The difference between the two attitudes may seem one of formulas, but it amounts to a difference of substance. For our part, we think that the English principle is the better founded, because the territorial sovereignty of the state involves aerial sovereignty once the command of the air has been established, and till that period arrives the safety of the public requires a prudent control over experiments. At the same time, however, there is a danger of restraining scientific instruction by too much regulation and we hope that the promised government measure, which is to deal

with the subject broadly, will not give excessive powers of arbitrary control to any minister or government department.¹⁸

THACKERAY AND THE LAW.—During the heat of the past summer the one hundredth anniversary of the birth of Thackeray was celebrated by the English Bar by a garden party and a banquet in the Middle Temple, of which the great novelist was once a member. But, says the English *Law Journal*, the law itself never had any attraction for him. He entered the chambers of Mr. Taprell at No. 1 Hare Court in 1831 to “read hard for the Bar,” and promptly discovered that he had no liking for the kind of training that was obtainable under a special pleader. “This lawyer’s preparatory education,” he wrote, “is certainly one of the most cold-blooded, prejudiced pieces of invention that ever a man was slave to. A fellow should properly do and think of nothing else than Law. The sun won’t shine into Taprell’s chambers, and the high stools don’t blossom and bring forth buds.” No writer, not even Lamb or Dickens, however, had a finer veneration for the Inns, or has given a more delightful description of life in the Temple than this one, which is familiar to all readers of Thackeray.

Those venerable inns which have the Lamb and Flag and the Winged Horse for their ensigns have attractions for persons who inhabit them and a share of rough comforts and freedom which men always remember with pleasure. I don’t know whether the student of law permits himself the refreshment of enthusiasm or indulges in poetical reminiscences as he passes by historical chambers and says, “Yonder Eldon lived; upon this site Coke mused upon Lyttelton; here Chitty tolled; here Barnewall and Alderson joined in their famous labors; here Byles composed his great work upon bills and Smith compiled his immortal leading cases; here Gustavus still toils, with Solomon to aid him’; but the man of letters can’t but love the place which has been inhabited by so many of his brethren or peopled by their creations as real to us at this day as the authors whose children they were—and Sir Roger de Coverley walking in the Temple garden and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with a Scotch gentleman at his heels on their way to Dr. Goldsmith’s chambers in Brick Court; or Harry Fielding, with inked ruffles and a wet towel round his head, dashing off articles at midnight for the Covent Garden Journal, while the printer’s boy is asleep in the passage.

CHINESE RESTAURANTS AND THE POLICE POWER.—The Supreme Judicial Court of Massachusetts decides that a statute making it a crime for women under the age of 21 years to enter a hotel or restaurant conducted by Chinese, or for the proprietor of any such hotel or restaurant to admit thereto women under the age of 21, without reference to the way in which the hotel or restaurant is carried on, subjects Chinese to an oppressive burden, depriving

¹⁸ The Law Journal (England), July 8, 1911.

them of liberty to carry on business, and denying them the equal protection of the laws, and is unconstitutional.¹⁹ Said the Court:

"By the strict terms of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons, although of the proscribed class founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. * * * The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the legislature may be of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of any other nationality. * * * The fact that a man is white, or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

APPOINTMENT OF EXPERTS BY THE COURT DECLARED UNCONSTITUTIONAL.—The proposal to get rid of the present unsatisfactory testimony of experts by having disinterested persons appointed by the Court to investigate the issues and testify at the trial has received a check in Michigan, for the Supreme Court of that state has decided that a statute in which this was attempted is unconstitutional. The Court says that at common law the parties to a criminal action are the people on one side and the accused on the other, and the prosecuting officer has the duty of determining what witnesses shall be sworn to establish the case he presents, and the conduct of the trial for the people is an executive act

¹⁹ Re Opinion of the Justices, 94 N. E. 558.

administrative in its nature, and a statute authorizing in trials for homicide the Court to appoint experts to testify at the trial imposes on the judicial department acts executive and administrative in character. And the Court further says that the provision of the statute that the fact that such witnesses have been appointed by the Court shall be made known to the jury changes the character of criminal procedure and endangers the constitutional safeguards by giving undue weight to the testimony of the experts appointed by the Court, and the statute is invalid.²⁰

RECORDS OF PUBLIC OFFICERS ARE PUBLIC PROPERTY.—It seems that whenever a written record of the transaction of a public officer in his office is a convenient and an appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not, and when kept it becomes a public document—a public record belonging to the office and not to the officer—it is the property of the state and not of the person. This principle was applied in a recent case in Indiana, where it was held that where a city treasurer prepared a card index system referring to assessments for public improvements at his own expense, such indexes not being required by law, an injunction against the removal of the indexes at the expiration of his term is not a “taking” of services or property without just compensation, which the Constitution forbids.²¹

DILIGENCE REQUIRED OF A BAILEE—NOTICE OF CLAIM BY THIRD PERSON.—In a recent English case²² a married woman, the plaintiff, had deposited with the defendant, who was a warehouseman, a quantity of furniture, and, on making the deposit, she left with him the address at which she was to be found. Some time later the plaintiff's husband, from whom she was separated, came to the defendant's premises and demanded the goods. The defendant declined to part with the goods without the plaintiff's authority, and gave him the address at which she was living. Subsequently the plaintiff's husband stated that he had been to the address given, and that his wife was not known there. He again demanded the goods, but was told that they would not be given up except under a magistrate's order. It appears that under an English statute a magistrate has authority on a complaint that property is wrongfully withheld to order its delivery after a hearing to the person who proves his right of possession. The plaintiff's husband thereupon applied to a magistrate for an order for

²⁰ *People v. Dickerson*, 129 N. W. 199.

²¹ *Robison v. Fishback*, 93 N. E. 666.

²² *Ranson v. Platt*, 104 L. T. 881.

the delivery up of the goods, and a summons was issued against the defendant. At the time when the summons was issued a representative of the defendant was in court and informed the magistrate that the reason why the goods were not delivered up was because they were warehoused in the plaintiff's name, and they could not give them up without her authority. No notice was given by the defendant to the plaintiff that the goods were claimed by her husband. When the summons was heard, the plaintiff's husband swore that his wife was not known at the address to which he had gone and the goods were his, and the magistrate made an order for delivery on payment of the defendant's charges. A representative from the defendant's firm was present in the police-court at the hearing of the summons, but was asked no questions in relation to the matter, and volunteered no information concerning the plaintiff. The plaintiff now brought an action against the warehouseman for the value of the goods, and the Court of Appeal rules that she is entitled to recover, as the defendant had failed in his duty as bailee in not properly defending the plaintiff's rights in the hearing before the magistrate. Vaughan Williams, L. J., said:

"The action is not really in form an action for negligence, but an action either for detinue or for conversion. Under these circumstances one wishes to know what is the duty of the bailee to the bailor. While the goods were in the possession of the bailee under a deposit made by the bailor and accepted as a bailment by the warehouseman the husband comes along, and his way of making the claim should have suggested to the bailee that the demand was not one he ought to have complied with. *Prima facie* his duty was to see whether the nature of the claim was such that he ought to communicate with the bailor. The claim put forward was for delivery up of the goods; *prima facie* it was the duty of the bailee to protect the title of his bailor. Under these circumstances I can only say that the bailee in this case did not take such steps to communicate to the bailor the fact that a claim had been made against her goods, as a reasonable man ought to have taken."

And Farwell, L. J., added:

"The bailee knew the address of the plaintiff, and wrote to her the next day after the order was made, yet he took no steps before the summons was issued to give notice of the summons to the bailor, nor did he attempt to protect her by taking care that the magistrate should not make an order affecting her interests in her absence. In my opinion the bailee owed a duty to his bailor to protect her interests, and I do not think that he discharged that duty by calling the attention of the magistrate to the matter. If the attention of the magistrate had been properly called to the matter, he could not have made the order which in fact he did make."

ELECTROLYSIS OF WATER MAINS—LIABILITY OF ELECTRIC CAR COMPANY.—A matter of great interest to electrical engineers and electrical corporations is considered in a case before the Federal

²² Peoria Water Works Co. v. Peoria R. Co., 181 Fed. 990.

Court in Illinois.²³ The action was by a water company against an electric street railroad company to enjoin the latter from injuring its mains and service pipes by electrolysis. The evidence showed that, while the escape of electricity from the rails to the water pipes and consequent injury to the latter by electrolysis could not be entirely prevented in the system used by the railroad company, it could be so lessened by means suggested and used elsewhere as to practically prevent serious injury. The Court decides that it is the legal duty of defendant to prevent such injury by all reasonable and practical means; that it would be enjoined from continuing such injury, but would be free to adopt within a reasonable time such means to that end as it should think proper, a court of equity having no power to prescribe by injunction the use of any particular system, even though the system in use results in the destruction of the pipes of a water company.

WASPS AND WORKMEN.—Wasps, said an English County Court Judge, in a recent case²⁴ have for more than two thousand years been conspicuous in satires upon judges and advocates, as in "The Wasps" of Aristophanes, and "Les Plaideurs" of Racine. But this was the first instances of a wasp figuring as the physical cause of actual litigation. The facts of the case were that one Amys was a farm laborer who went one day with his master's machine to his master's field to help to thrash his master's wheat. When the work was in progress some of the laborer's saw wasps upon the drum and at the back of the machine "right close against Amys," who was engaged driving the engine. No wasp was seen elsewhere that day or thereafter. Next day Amys had a swollen leg and complained of pain, and a fortnight later died from, the physician testified, the effects of a wasp sting. His widow now asked compensation from the master under the English statute, and the question was whether the accident was one arising out of the course of his employment. The judge held that it was, saying:

"Having regard to the nature of the employment and to all the circumstances, I think the fair inference is that the wasps seen so late as October 18 were female wasps which had gone into winter quarters near the wheat stack; that they were aroused and exasperated by the motion, noise, and heat of the thrashing machine; and that in their wrath they stung Amys. This would be in keeping with their well-known character. What further inference of fact should be drawn? If when the wheat was nearly all thrashed a rat, touched by a pitchfork, had jumped from the bottom of the stack and bitten Amys, would 'the man in the street' hesitate to say that the accident arose out of the employment? I think not, and I can see no difference in principle between that case and this. The work brought Amys to the wasps, and it also brought the wasps to Amys. The employment was the source—the *ons et origo*—of the sting and the poison."

²⁴ Amys v. Barton, Eng. L. J., July 15, 1911.

The defendant's counsel argued that the facts resembled those in *Crashe v. Wigam*,²⁵ where compensation was refused for an injury caused by a cockchafer and he distinguished *Rowlands v. Wright*,²⁶ where compensation was given for the bite of a stable cat. But the judge replied:

"Many minds have been exercised for years in building up a superstructure of judicial law upon those ten trite words which are contained in the act. Mr. Bagge cited a number of judicial decisions favorable to the widow; Mr. Dodson cited an equal number adverse to her. The truth is, the judgments read are conflicting. Happily, *non nostrum est tantas componere lites*. The Lord Chancellor has, since this case was argued, made a new departure for us. In *Kitchenham v. Johannesburg*, after referring to the ten words already quoted, Lord Loreburn said that they were of inexhaustible variety of application according to the nature of the employment and the character of the facts proved; that the facts in each case were infinitely different; and that if judges were on each argument to discuss and differentiate them one from another, judgments would be interminable and would lead rather to confusion than to enlightenment."

PURE FOOD LAWS—LEGISLATIVE INTERFERENCE WITH SELLER'S HABIT TO MAKE HIS GOODS ATTRACTIVE.—In *State v. Earl*,²⁷ the Court of Appeals of this state, in deciding that the statute of 1909, which requires all vinegar sold to be without artificial coloring or flavoring, and prohibits the sale of any vinegar labeled as cider vinegar or apple vinegar which is not the product of pure apple juice, and provides that no vinegar shall be branded "fruit vinegar" unless it be made wholly from fruit, prohibits the false coloring or flavoring of vinegar as well as its false branding, so that one selling vinegar artificially colored with caramel was punishable under the statute, considers the constitutionality of so broad an interference with a manufacturer's and a seller's ancient privileges. It decides in favor of the statute, saying that the discretion of the Legislature in exercising the police power extends to the line of one's natural rights guaranteed by the Constitution. The line is not always easily seen, but it is not crossed by this statute, though the Court does not approve all of the reasoning in the *Addington* and *Powell* cases,²⁸ which uphold the power not only to regulate but to wholly prohibit the manufacture or sale of an article of food considered to be wholesome and nutritious.

"Many wholesome, palatable and popular articles of food were distasteful—perhaps obnoxious—when first offered to the public. Taste is often a matter of cultivation. Prejudice from association of ideas frequently is dispelled by repeated tests of the things once considered repulsive. So that if it be allowed to be within the power of the legislature to wholly prohibit the manufacture of wholesome and nutritious articles of food against which there is a prejudice, or which is obnoxious to the palate, and on those grounds, the startling result is that all things new in the line

²⁵ 25 Times L. R. 632.

²⁶ 24 Times L. R. 852.

²⁷ 133 S. W. 402 (Mo.).

²⁸ 12 Mo. App. 214; 77 Mo. 110; *Powell v. Com.*, 114 Pa. St. 265; 127 U. S. 678.

of edibles may be forbidden; which is but saying that the majority, acting through the legislature, may prescribe, in part, the diet of the minority. Our decision can be placed on the ground of preventing the perpetration of a fraud, which we think is a safer and sounder reason than is found in parts of those decisions, especially as reported in 12 Mo. App. The legislative declaration that vinegar kept for sale should not be artificially colored is not a prohibition of its manufacture or sale. It is a mere regulation saying that it shall not be manufactured and sold with a false color; and a false color is a deception, in which there cannot exist a vested right.

"The strongest suggestion which occurs to us against the validity of the statute relates to the right of the tradesman, constantly exercised since trade began, to make his wares attractive by appealing to the taste of consumers. The artisan makes articles of brass and so fashions it that it looks like gold. He coats base metal with gold and with silver so that it seems to be the latter metals. He makes glass to appear like precious stones. The manufacturer colors his cloths, his silks, his ribbons and other articles of wearing apparel so that they become attractive to the eye and suitable to different tastes. Does the food manufacturer do any more when he recognizes that food made attractive to the eye finds easier sale? He puts pictures on a variety of goods and he displays liquids in colors, not to deceive, but to attract. The warning is given in Proverbs not to look 'upon the wine when it is red,' doubtless, in part, for the reason that in such color it was more tempting. Now it might be said that defendant transfused a pleasing harmless color into his uninteresting white vinegar, with the legitimate and commendable purpose of making it attractive to customers by appealing to their fancy, and that he did not intend or entertain the mean purpose to defraud. But these suggestions only bring us around to the question stated at the outset, viz., the authority and discretion of the Legislature, under its police power, exercised within reasonable bounds, to decide when an article which likely may be a fraud, or which may be calculated to work deception, will, in fact, hurt and deceive the public."

HATS IN THEATRES AND CONSTITUTIONAL LAW.—Few if any new statutes are enforced in this country without a challenge as to their constitutionality and an appeal to the courts for a decision on this point. In Atlanta, Georgia, the proprietor of a theatre had been convicted and fined under a law of the city which makes it "the duty of the proprietor, lessee, or other person in charge of every opera house, or theatre, or moving picture show, or vaudeville performance, or similar exhibition in the City of Atlanta to require ladies who attend performances in such theatre or opera house to remove their hats before the performance begins and to keep them off during the performance." It was objected, in the first place, that such a statute was not within the police power of the state or of the city. But the Court was of a different opinion, saying that it is a matter of common knowledge that the style of modern hats worn by ladies, if permitted to be worn by them while the performance is in progress, will prevent those who may be so unfortunate as to sit in the rear of ladies from seeing the stage or from enjoying the spectacular entertainment there presented which is a most important part of the performance. "Nothing more greatly mars the pleasure of an entertainment, or disturbs the comfort of those who may be so unfortunate as to be located behind these obstructions, or more irritably disturbs or interferes

with the comfort of the audience attending the theatres or moving picture shows, than these large hats worn by ladies, which in many cases completely obstruct the view of the performance. The spectacular is the principal part of the moving picture shows. The evil aimed at by this ordinance, the mischief it was intended to prevent, and the nuisance it was passed to abate, all clearly show that the ordinance in question is within the police power of the city and is authorized by the general welfare clause of its charter." The second objection, that it was an unwarranted interference with the rights of a person to conduct his business in his own way fared no better. It was not such an interference, said the Court, but simply a requirement that he shall operate it in such manner as not to disturb the public tranquility, peace, and comfort of those who may be assembled there. "The proprietors, or those who operate such establishments, have themselves the right to make any reasonable rules and regulations for the orderly conduct of such places, and, where they cannot effectually do so, it becomes the duty of the municipality to interfere and make such regulations as will secure the orderly conduct of such places and the peaceful and full enjoyment of those who have a right to assemble at such places. Neither is the ordinance unreasonable because it imposes upon the proprietor a burdensome duty which he cannot enforce. If the ordinance is lawful, he can enforce it by simply calling to his aid the police of the city to arrest any lady who refuses to obey the regulation and remove her hat. Besides, it is a matter of common knowledge that the ladies of our country are always amenable to reasonable requests conducing to the comfort of others." Nor was it discriminating because it applied to women and not to men.

"Men do not need any regulation on this subject. Public opinion, which demands that the man shall take off his hat in the presence of ladies, is sufficient, and does not need the aid of any police regulation. If it were the fashion for men to wear hats of such description as those worn by ladies in this day and to keep them on in public places, could it be doubted that there would be a loud and vociferous demand on the part of the ladies for the abatement of such a nuisance."

VITAL STATISTICS AND CONSTITUTIONAL LAW.—But a statute of Ohio requiring physicians and midwives to make certificates of births and accompanying facts to the Bureau of Vital Statistics, did not fare so well as the Hat ordinance, for it was decided by the Supreme Court to be arbitrary, unreasonable and unconstitutional. The law in question required the physician or midwife to certify as to whether the birth was legitimate or illegitimate, and, except in case of illegitimacy, the full name, residence, color or race, birthplace, age, and occupation of the father; the maiden

²⁰ *Oldknow v. Atlanta*, 71 S. E. 1015.

name in full, residence, color or race, birthplace, age, and occupation of the mother; the number of this child of the mother, and the number of living children of the mother. It also provided that no certificate shall be held to be complete and correct which does not supply all of the items of information called for therein, or satisfactorily account for their omission; and that the physician or midwife who shall neglect or refuse to file a proper certificate of birth with the local registrar, within the time required by the act, should be guilty of a misdemeanor. The state, the Supreme Court says, has not the right to draft a citizen into particular service without substantial compensation. Here a professional attendant at a birth is required to enter upon an inquiry as to non-professional questions, to supply information to, it may be, a non-professional official, "clothed with a little brief authority," in relation to matters which perhaps are interesting as vital statistics, but which are not necessary or even closely related to the public safety, the public morals, or the public welfare; an inquiry, too, which could be just as well and more appropriately conducted, reported upon, and certified to, by the local registrar, or a township assessor, or a census taker.³⁰

UNCLAIMED DEPOSITS IN SAVINGS BANKS.—The Supreme Court of the United States has decided that a statute of Massachusetts providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver-general, to be held by him as trustee for the true owner or his legal representatives, would not operate to take the property of a savings bank without due process of law or unconstitutionally discriminate against savings banks or unconstitutionally impair the obligation of contracts between savings banks and their depositors.³¹

Savings banks, the Court says, are maintained in the expectation that the deposits may for years remain uncalled for, to the mutual advantage of bank and customer. Had the statute provided that the money should be paid over to the receiver-general, if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented. But this law deals with absence and non-action so long continued as to suggest that the law of escheats or of lost property might be enforced. It is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leaving no heirs, nor does it purport to dispose of lost property,

³⁰ State v. Boone, 95 N. E. 924.

³¹ Provident Trust v. Malone, 31 S. C. Rep. 661.

but deals with a deposit the owner of which, though known, cannot be found. The act is like those which provide for the appointment of custodians for the real and personal property of an absentee. There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage earners, moving from place to place, there is special reasons for intervening to protect their interest in this class of property in banks as to which the state's supervisory power is constantly exercised.

NEGLIGENCE AS TO PERSONS INVITED ON PREMISES—SHOWING CARPETS ON SLIPPERY FLOOR.—The Supreme Court of Washington rules that it is not negligence *per se* for a storekeeper to display carpets on a smooth hardwood floor, and after showing them to a female customer to allow them to remain there for awhile, even though the customer slipped and fell on a small carpet so spread out.³² The Court properly applies the definition of negligence as the absence of care according to the circumstances of the particular case. One's duty to another is to be tested by what the ordinarily prudent person would do in a like situation. It is customary for carpet dealers to exhibit their stock upon a hardwood floor which, by reason of the constant slipping of carpets over and upon it, is always smooth, and it is also the custom to permit the carpets, after being shown, to remain upon the floor a reasonable length of time until removed by a porter. This being the usual custom followed by ordinarily prudent merchants in the same line of trade, the storekeeper in question was not guilty of negligence in adopting it. He was not a warrantor of the safety of customers. The plaintiff was accustomed to polished hardwood floors. She had them in her own home and knew that rugs and small pieces of carpet upon such floors will sometimes slip when stepped upon. Everyone who enters the modern home with its rugs and hardwood floors knows this. It was not negligence for the storekeeper to maintain the same floor condition in his store that the plaintiff maintained in her own home. The case does not fall within the principle announced in those cases holding merchants guilty of negligence when maintaining open and unguarded stairways, basement entries and places of like character, or in permitting obstructions to remain upon their stairways or in aisles upon which the unwary are liable to step and fall.

³² *Chilberg v. Standard Furniture Co.*, 115 Pac. 857.

ALIENS—JURY DE MEDIETATE LINGUAE.—The right of an alien to a mixed jury—one composed of denizens and aliens—has been seldom claimed in this country,³³ but was demanded recently in Kentucky, where a native and citizen of France was charged with murder. An old statute of that state provides that juries *de medietate linguae* may be directed by the Court.

The Court of Appeals rules that an alien prisoner, whose application for a jury *de medietate linguae* had been denied and who had been tried by a jury selected in the ordinary way, had not been deprived of any constitutional right, and that, as according to the language of the statute the direction of such a special jury was not made mandatory, the same rested in judicial discretion, subject to review on appeal for abuse of discretion, and that no error appeared entitling the defendant to a new trial. His conviction of murder was therefore affirmed, the Court saying:

"A jury *de medietate linguae* is one composed half of aliens and half of denizens, and by an ancient act of Parliament an alien might claim as a matter of right both in civil and criminal cases such a jury.³⁴ But it is obvious from the scanty mention of juries of this character by the common-law writers as well as the dearth of court opinions that the practice of allowing such a jury had grown into non-use in England long before the establishment of this government; and the fact that a law so antiquated and obsolete should be found incorporated in the statutes of this state may well be regarded as one of the curiosities of legislation. But the section as it now stands was in the general statutes adopted in 1873 and the revised statutes adopted in 1854, and seems to have been handed down from an act of the legislature adopted in 1796 that may be found in 1 Littell's Laws, p. 476. It will thus be seen that a law for which there was never any reason in the jurisprudence of the state has been retained from its earliest history in every compilation of the statutes. It stands now and has always stood apart from all other sections of the statute relating to the selection of juries, and has never had any orderly connection with the elaborate system of laws treating of this subject that have from time to time been enacted. Not only so, but this privilege allowed aliens is, and has always been, contrary to the spirit of Ameri-

³³"An examination of the published opinions of other courts discloses the fact that in very few reported opinions has it ever been considered by a court of last resort in the United States. In North Carolina, in 1825, the question was presented to the Supreme Court of that State in the case of *State v. Antonio*, reported in 11 N. C. 200, and the court denied the right of an alien to demand such a jury. In *People v. McLean*, a case decided by the Supreme Court of New York in 1807 and reported in 2 Johnson's Reports, p. 380, the trial court allowed the prisoner the privilege of a jury *de medietate linguae*, and in a brief opinion the court said that it was proper to do so. In the case of *Res pub-*

lica v. Mesca, found in 1 Dallas' Reports, p. 73, 1 L. Ed., 42, a Pennsylvania court of oyer and terminer granted the request of alien prisoners for a jury *de medietate linguae*. In *Richards v. Commonwealth*, decided by the Supreme Court of Virginia in 1841, and reported in 11 Leigh, p. 690, the question of the right of an alien prisoner under a statute like ours to a jury *de medietate* was elaborately considered, and the court held that the right to order such a jury was within the discretion of the trial court."

³⁴3 Blackstone's Commentaries, p. 361; Bouvier's Law Dictionary, tit. Jury; Forsythe's History of the Law of Juries, p. 228.

can institutions and the public policy of this country. No good reason can be assigned why an alien who takes up his abode with us should not be tried for an offense against our laws in the manner and form provided for the trial of other offenders, or why any privilege or preference should be extended to aliens that is not extended to citizens; and, if the right to such a jury was not recognized by the statute, we would have no hesitation in denying it. But, as the right to his jury is conferred alone by the statute, so by the terms of the statute the correctness of the ruling of the trial court is to be judged, as the right to demand a jury *de medietate lingue* is not guaranteed either by the constitution or by the common law as expressed in it."²³

²³ Wendling v. Com., 137 S. W. 204.

NOTES OF RECENT DECISIONS.

AUCTIONS—LIABILITY OF AUCTIONEER.—An auctioneer, pursuant to an advertisement for the sale of stock at public auction for account of whom it might concern, on specified terms, offered stock for sale without disclosing the owner. A bid was accepted and the stock was declared sold to the bidder, who paid the partial payment demanded, and offered to pay the balance at the time fixed in the advertisement, which was signed by the auctioneer as such. The purchase price was made payable to the auctioneer at his office. *Held*, to create a contract in which the auctioneer was the seller and the bidder the buyer, so that the auctioneer could not escape personal liability by showing that he disclosed to the bidder the owner of the stock on the day of sale when he tendered the partial payment called for.¹

BOYCOTTING—CONSPIRACY TO INJURE PROPERTY.—Plaintiff is a "nonunion" manufacturer of wood work, employing men without reference to their membership in labor unions, and defendants, the officers of a woodworkers' union, requested plaintiff to "unionize" his plant by employing union men, and on its refusal to do so defendants circulated notices among the owners, contractors, and builders of the city to the effect that the members of the union would refuse to handle material not made under "strict union conditions," and such notices contained a list of the firms working under agreement with the union, which omitted plaintiff's name, and the union called strikes, enforced by fines against its members, against the builders and contractors who used plaintiff's materials. *Held*, that the acts of the union, through defendants, its officers, constituted an illegal attempt to injure the good will of plaintiff's business, so as to constitute a conspiracy which would be enjoined; the fact that the ordering of the strike was legal being immaterial.²

CARRIERS OF PASSENGERS—CARRYING PASSENGERS PAST DESTINATION—PROXIMATE CAUSE.—A carrier negligently carried a woman passenger beyond her station and compelled her to alight at the next station in a dark night and drizzling rain with two children and a large basket, and she could not reach the highway leading back to her destination because of the mud and walked along the tracks pointed out to her to be the best way to go and fell and was injured. *Held*, that the company was liable for the injuries sustained, as it ought reasonably to have anticipated that she would walk back on the track, so that its negligence was the proximate cause of the injury.³

CHARITIES—FAILURE OF TRUSTS.—A charitable trust to found a home for Presbyterian clergymen decayed by age or disabled by infirmity, and who do not use tobacco in any form, did not fail because of the failure of applicants for admission to the home where it appeared that they were deterred not by the restriction against the use of tobacco, but by a restriction imposed by the managers without authority, requiring applicants to separate from their wives, and that, if the latter restriction would be removed, there would be more than enough applicants and their wives to fill the home.⁴

¹ Meyer v. Redmond, 125 N. Y. S. 1052.

² Albro J. Newton Co. v. Erickson, 126 N. Y. S. 949.

³ Reimard v. R. Co., 77 A. 560 (Pa.).

⁴ Hamilton v. Mercer Home, 77 A. 630 (Pa.).

CHARITIES—VALIDITY—IMMORAL DOCTRINES OF RELIGIOUS INSTITUTION.—A bequest to an institution will not be defeated, as against public policy, because the writings upon which the doctrines of such religious institutions are based may be susceptible of a construction which would make them obnoxious to certain common standards of morality, where such writings do not appear to constitute a part of the religious doctrines of the church, at least not with the offensive interpretation put upon them.⁵

CLUBS—DUES—POWER TO INCREASE.—A club organized under a law which provides that the fees and dues of the members of societies or clubs authorized thereunder shall be established by by-laws which shall be from time to time modified or changed, has power to increase the annual dues of members by an amendment of its by-laws.⁶

CONFLICT OF LAWS—FOREIGN JUDGMENT—PROSECUTION FOR CRIMINAL OFFENCE—JUDGMENT OF FOREIGN COURT IMPOSING FINE AND AWARDED DAMAGES—RIGHT TO SUE UPON JUDGMENT.—By the law of France, where an offender is prosecuted for a criminal offence, a person who has been injured by the act constituting the offence has the right of intervening in the proceeding and claiming damages from the accused in respect of the injuries sustained, and the court, while imposing a fine for the criminal offence, may also award damages to the injured person. *Held*, that in such case the portion of the judgment of the French court which awards damages to the injured person can be severed from the portion which imposes the fine and is of a penal character, and an action can be maintained in this country upon the judgment to recover the damages awarded, without any breach of the rule of international law that the courts of one country will not enforce the penal judgments of the courts of another country.⁷

CONTRACTS—CONSIDERATION—PERFORMANCE OF LEGAL OBLIGATION.—A contractor, who agreed to construct a house in a workmanlike manner, being bound without additional consideration to put in a foundation for the cellar walls where the wetness of the soil rendered one necessary, though such a foundation was not called for by the contract or contemplated when it was made, he could not recover on the owner's promise to pay for this extra work, as the promise was without consideration.⁸

CONTRACTS—MORAL OBLIGATION—CONSIDERATION.—The moral obligation resting on a corporation to furnish assistance and care to an injured employee for whose injury the corporation was in no wise responsible, constitutes a sufficient consideration for an agreement made by its president to pay a physician for professional services rendered such employee.⁹

CONTRACTS—RESTRAINT OF TRADE—COVENANT NOT TO CARRY ON OR BE CONCERNED IN CARRYING ON A BUSINESS—EMPLOYMENT AS SERVANT.—Defendant was employed by plaintiffs, a company engaged in the business of chimney sweeping, upon the terms of an agreement which contained a covenant by which he undertook that he would give the whole of his time and services to the company; that he would not undertake any work or orders of any kind except for the company and in their name and on their behalf, nor carry on or be concerned in carrying on the business of a chimney sweep either by himself or in conjunction with any other person or persons now or at any time within a radius of three miles of a specified point. After leaving plaintiff's employment defendant was engaged as a journeyman chimney sweep by a person carrying on business in compe-

⁵ *In re Kramp's Estate*, 77 A. 814 (N. J.).

⁷ *Raulin v. Fischer*, 104 L. T. 849 (Eng.).

⁶ *Thompson v. Wyandauch Club*, 127 N. Y. S. 195.

⁹ *Creamery Package Co. v. Russell*, 78 A. 718 (Vt.).

⁸ *Scott v. Monte Cristo Co.*, 115 P. 64 (Cal.).

tion with the plaintiffs in the prescribed area. *Held*, that the covenant entered into by defendant was not broken by his acting as a servant to a chimney sweep.¹⁰

CONTRACTS—ACCEPTANCE OF OFFER—KNOWLEDGE OF OFFER.—Where plaintiff deposited money with defendant trust company relying only on its advertisement that it "allows interest on deposits," and ignorant of its rules for paying 2 per cent. interest computed at certain times and in a certain manner, there was no contract on the theory of an acceptance of an offer to pay such interest so computed, as, in order for a contract to so arise, all the terms of the offer must have been known.¹¹

DEFAMATION—PRIVILEGED COMMUNICATIONS.—Advice by an attorney to a client as to the business integrity of a third person with whom such client has been dealing is privileged. But, when such advice is given in a public or semipublic place in a loud voice and in hearing of divers persons, and is addressed, not to the client, but to the third person, is slanderous, and without need of either publicity or loud utterance, express malice is a jury question.¹²

EMINENT DOMAIN—CREATION OF NUISANCE—LIABILITY.—A city may not, in its own right, or under the authority of the board of health, create a nuisance to adjacent property by establishing a dumping ground for garbage and refuse matter without first making full compensation to the owner of the adjacent property.¹³

EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.—1. The admissibility of dying declarations is only *prima facie* a question for the court. After testimony as to the statements of the deceased is admitted it is for the jury to determine whether they were in fact made by him when he was in the article of death and when conscious of his condition, so as to make them dying declarations. Even when the jury is satisfied that the statements attributed to the deceased were made by him, and that he was at that time in a dying condition and conscious of that fact, they should still be received with great care and weighed with caution. 2. The admissibility of dying statements attributed to a deceased person is not affected by the fact that the statements may have been elicited in response to questions put to him by a bystander, nor does it matter how or by what means the deceased becomes conscious that he is dying, provided he is really conscious of that fact and impressed with the solemnity of his situation. The circumstances under which one mortally wounded might be apprised of his dying condition, as well as the fact that he made his statements in response to questions or under other circumstances, may affect the credibility of the alleged statements, and the jury, in the light of the facts and in the exercise of the caution required by law, would have the right to accept them as true or to reject them as unworthy of credit, because they might be considered due to outside influence or because made in a spirit of revenge, or because made under such circumstances that the declarant was either unable to state the facts or unwilling to do so.¹⁴

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—NATURE OF ACTION.—The action of a husband for the alienation of his wife's affections extends to all wrongful interference by others, causing a wife to leave her husband or to do things destructive of marital happiness, the gist of action being the enticing of the wife and alienation of her affections, and not depending

¹⁰ *Ramanour Co. v. Brixey*, 104 L. T. 809 (Eng.).

¹¹ *Stone v. St. John Union Trust Co.*, 130 S. W. 825 (Mo.).

¹² *Kruse v. Rabe*, 79 A. 316 (N. J.).

¹³ *City of Georgetown v. Ammerman*, 136 S. W. 202 (Ky.).

¹⁴ *Smith v. State*, 71 S. E. 606 (Ga.).

on the debauching of the wife, but neither her voluntary bestowal of affections upon one who did nothing wrongful to gain it, nor her intercourse with one who did not seduce her, will support the action.¹⁸

HUSBAND AND WIFE—EXPENDITURE BY WIFE FOR NECESSARIES—RECOVERY OF HUSBAND.—A wife, abandoned by her husband, who departed the state, having obtained necessities for the family and paid therefor with her private means and money earned by her, may, under the theory of subrogation to the rights of those who furnished the necessities, recover of her husband the amount expended therefor.¹⁹

INSURANCE—FIRE—PROVISION AGAINST FIREWORKS—GENERAL MERCHANDISE STORE.—In the absence of fraud or mistake, recovery cannot be had on a fire policy, conditioned to "be void if (any use or custom of trade * * * to the contrary notwithstanding) there be * * * on the above-described premises * * * fireworks," where fireworks were kept in stock in the building at the time of the fire, and this, though the building was insured as a "general merchandise" store, and fireworks are generally kept in such a store; the keeping of them not being necessary in such a business, and this, too, though the prohibition is in the printed part, and the description of the business to be conducted on the premises is in writing, the written part not overriding the printed part, except in case of irreconcilable conflict.²⁰

JUDGMENT—RES JUDICATA.—On February 3, 1908, plaintiff, while riding in a wagon, was run into by the defendant's trolley car, and as a result his horse and wagon were damaged, and he was injured in his person. He brought suit to recover damages for injuries to his horse and wagon, and recovered a judgment for \$200.75 on August 10, 1908, which judgment was paid. On August 19, 1908, he brought suit to recover damages for the injuries to his person received in the same incident. *Held*, that the first judgment and its satisfaction bars the second action.²¹

LANDLORD AND TENANT—REPAIRS—NEGLIGENCE.—A landlord who though under no duty to make repairs on premises leased by him nevertheless made some repairs at the request of his tenant, is liable in damages to the tenant, it appearing that the landlord was negligent in doing the work, the negligence consisting in laying a new floor in a barn on old beams with the result that the floor collapsed under one of the plaintiff's horses, causing the horse's death.²²

LANDLORD AND TENANT—MISCONDUCT OF SUBTENANT.—A tenant is under no implied obligation to answer for the good conduct of a subtenant, and cannot control his conduct outside the terms of his lease.²³

LICENSE—REAL PROPERTY—REVOCABILITY.—At law a license cannot create or transfer any interest in land; and it is revocable, though granted for a valuable consideration, and though money may have been expended on the faith of it.²⁴

MASTER AND SERVANT—TERMINATION OF SERVICE—CUSTOM—JUDICIAL NOTICE OF—RIGHT OF SERVANT TO WAGES ACCRUED DUE.—Plaintiff, who was a domestic servant, entered the service of defendant on the 3rd November. On the 17th November she gave notice to leave at the end of the first

¹⁸ *De Ford v. Johnson*, 133 S. W. 393 (Mo.).

¹⁹ *DeBrauwere v. De Brauwere*, 126 N. Y. S. 221.

²⁰ *Norfolk Ins. Co. v. Talley*, 71 S. E. 354 (Va.).

²¹ *Ochs v. R. Co.*, 77 A. 533 (N. J.).

²² *La Brasca v. Hinchman*, 79 A. 885 (N. J.).

²³ *Mudge v. West End Co.*, 125 N. Y. S. 15.

²⁴ *Baynard v. Every Evening Printing Co.*, 77 A. 885 (Del.).

month of her service, and accordingly left on the 3rd December. Defendant declined to pay her wages for the month during which she had been in his service, and plaintiff brought an action. A custom was set up on her behalf that in a contract of domestic service either party was entitled in the absence of special terms as to notice to put an end to the contract at the end of the first month by notice given at or before the expiration of the first fortnight. No evidence was given of such a custom, but the judge said that he had taken judicial notice of it before, and that he would do so upon this occasion. He therefore gave judgment for plaintiff for the amount claimed. *Held*, that the judge was entitled to take judicial notice of the custom, and that plaintiff was entitled to the month's wages which had accrued due although she had wrongfully left defendant's service.²²

MINES AND MINERALS—FIRECLAY.—The reservation of "mines and minerals" includes any thing exceptional in use, character, or value, provided that it is included in the words "minerals" as usually understood by land-owners, and persons engaged in mining or commerce. Therefore fireclay lying in seams at a depth varying from 60 ft. to 140 ft. below the surface, not forming the subsoil of the place in question, obtained by underground workings, and used for making goods of a high grade capable of resisting great heat, was held to be a "mineral" within the reservation.²³

MUNICIPAL CORPORATIONS—SEWERS—DEFECTS.—A city was not liable for the overflowing of a sewer into plaintiff's premises, where the backing up of the sewage was caused by a stoppage of sticks used by children playing in the street, where it did not appear how long the stoppage had existed, so that any reasonable inspection would have revealed the obstruction.²⁴

MUNICIPAL CORPORATIONS—OFFICERS—LIABILITY IN TORT.—The members of the municipal council of a city, authorized to conduct the affairs of the city, are not liable in tort to an individual aggrieved by the action of the council in denying without hearing his petitions for the restoration of water rates, for the removal of a police officer for an unprovoked assault on him, and for placing on file without notice certain petitions presented by him, though the members acted towards him with ill will; they being answerable to the public alone.²⁵

NEGLIGENCE—THEATERS AND SHOWS—INTERVENING CAUSE.—Defendants constructed a performers' platform as a part of the accessories of a street fair in a negligent and unsafe manner. No provision was made to keep children from going beneath the stand, or from keeping the crowd from going upon it. Plaintiff's minor son was killed by the collapse of the stand while under it, due to many persons crowding upon it in order to see certain attractions afforded by the fair. *Held*, that the climbing of the spectators on the platform, and the surging of the crowd against and around it, was not such an intervening cause as to relieve defendants from liability for their original negligence.²⁶

NUISANCE—NOXIOUS VAPORS—DAMAGES.—*Held*, that plaintiffs were entitled to recover damages for injuries to their growing crops of vegetables, caused by noxious products, smoke, and soot emitted from an oil refinery owned and operated by defendant, notwithstanding that there was no evidence of negligence on the part of defendant in operating the refinery.²⁷

²² *George v. Davies*, 104 L. T. 648 (Eng.).

²³ *Caledonian R. Co. v. Glenborg Co.*, 104 L. T. 657 (Eng.).

²⁴ *Byer v. New York*, 126 N. Y. S. 455.

²⁵ *Hodgdon v. Moulton*, 93 N. E. 656 (Mass.).

²⁶ *Murrell v. Smith*, 133 S. W. 76 (Mo.).

²⁷ *Vautier v. Atlantic Co.*, 79 A. 814 (Pa.).

OFFICERS—PUBLIC BUILDINGS—SUBSCRIPTION TO INDUCE LOCATION.—It was no objection to the selection of a site worth exceeding \$32,000 for the location of a post office building by the Secretary of the Treasury that Congress has restricted the amount of public funds to be paid therefor to \$15,000, and that private citizens had agreed to donate the balance if the more valuable site were selected, there being no claim that the Secretary was not wholly free from any influence, save his judgment of the suitability of the location and the donations towards the cost.²⁸

PARENT AND CHILD—TORTS OF CHILD—PARTICIPATION BY PARENT.—To charge a parent with his child's tort, the parent's participation must be alleged and proved; it not being presumed as a matter of law from the relationship. That defendants' infant entered plaintiffs' employ with defendants' consent, and he turned over his wages to them, did not make him the agent or servant of defendants, so as to charge them with liability for his conversion of the employers' money.²⁹

PARENT AND CHILD—NECESSARIES—FATHER'S LIABILITY.—A husband who allowed his wife and their family physician to take his minor child to a city for treatment by a surgeon, and the two physicians found that the only hope of saving the child's life was an immediate operation, which was then properly performed, he is liable for the surgeon's fee, though the child died and the operation was without his knowledge and against his wishes, but of which latter fact the surgeon was uninformed.³⁰

PARENT AND CHILD—NEGLECT TO SUPPORT—"NECESSARY."—A statute provides that if any father without lawful excuse neglects to provide such infant with "necessary" food, etc., he shall be punished. D and his wife separated, the wife going to her father's house, taking with her one child of the marriage, and another was born at the house of the wife's father, and both the children were there supplied with all necessary food, etc. D after the separation contributed nothing to their support. *Held*, that "necessary" food, clothing, and lodging, as used in the statute, is food, etc., which the infant actually needed at the time; and that as the infant children were receiving necessary food, etc., D was not guilty.³¹

PHYSICIANS AND SURGEONS—"CHIROPRACTIC."—The system of practice called "chiropractic," consisting of an examination of the spine with the fingers, and the adjustment of vertebræ, thereby removing the cause of disease, involves diagnosis and physical treatment, and is within the statute of 1901, prohibiting any person from practicing medicine or surgery or from attempting to treat the sick without first obtaining a license.³²

PUBLIC PLACE—ANNOYANCE OF PASSENGERS—LANGUAGE ONLY HEARD BY PERSONS IN PUBLIC-HOUSE.—By a by-law made by a County Council, any person who in any street or public place should make use of any profane, obscene, or indecent language to the annoyance of passengers should be liable to a penalty. *Held*, that the by-law did not apply to the use of alleged indecent language in a public-house to persons therein.³³

RELIGIOUS SOCIETIES—RIGHTS OF RECTOR AND CONGREGATION OF EPISCOPAL CHURCH.—The powers of the vestry, to affect the relation between the rector and congregation, must be exercised in subordination to the church canons, and the vestry may not by resolution dispense with a rector's services and

²⁸ *Currier v. U. S.*, 184 Fed. 700.

²⁹ *McCarthy v. Heiselman*, 125 N. Y. S. 13.

³⁰ *French v. Burlingame*, 134 S. W. 1100 (Mo.).

³¹ *State v. Thornton*, 134 S. W. 519 (Mo.).

³² *State v. Smith*, 135 S. W. 465 (Mo.).

³³ *Russon v. Dutton*, 104 L. T. 601 (Eng.).

discharge him from office without action of the superior ecclesiastical authority. The position of rector necessarily carries with it the right, as well as the obligation, to perform the religious duties incident to his position, and includes the right of admission to the church building, and unhampered opportunity for performance of all religious duties, and, where the vestry without authority from the superior ecclesiastical body of the diocese attempt to terminate the relations between the rector and the congregation, they cannot exclude him and the people from the church building and prevent him from conducting religious services therein, and any attempt to do so may be restrained by injunction.³⁴

REWARDS—PUBLIC OFFICERS—CITY JAILER.—A city jailer having in his custody one suspected of stealing property, and who procures from such person in the jail, while on duty as jailer, a confession as to the whereabouts of the property, which enables him to recover it, is forbidden by public policy to receive a reward for its recovery.³⁵

SALES—CONTRACT—INDEFINITENESS.—An order for \$360 worth of jewelry to be made up of articles named in a price list contained in the order, is void, where it cannot be determined from the writing itself either the quantity, quality or price of any of the articles specified, which the plaintiffs were bound to ship and which the defendant agreed to purchase.³⁶

SEARCHERS AND SEIZURES—POLICE OFFICERS—PHYSICAL EXAMINATION.—A physical examination by the superintendent of police of Chicago of policemen, as authorized by ordinance, to determine whether policemen are able to perform their duties, enacted under an act providing for the incorporation of cities, and authorizing the council of cities to regulate the police thereof, is not an invasion of Const., art. 2, sec. 6, guaranteeing immunity from unreasonable searches; and while the superintendent may not forcibly make a physical examination of a policeman, yet a policeman who refuses to submit to an examination and to abide by the rules of the department commits the offense of disobeying the superintendent, and subjects himself to a charge before civil service commission.³⁷

TAXATION—SEVERANCE OF OIL, GAS, AND MINERALS.—The title to oil, gas, and minerals may be severed from the grant of the surface of unseated land, and may be separately taxed if they have taxable value.³⁸

TELEGRAPHS AND TELEPHONES—FAILURE TO GIVE SERVICE—ACTION.—A telephone company is a common carrier of intelligence, engaged in a public service, holding itself out to the public, in consideration of certain fees exacted, as able, ready, and willing to enter into contracts which will place persons in direct communication with each other; and it may also hold itself out to render their services, such as the transmission of messages, its liability being measured by the duty assumed. It is not necessary, to justify a recovery against a telephone company for failure to place persons in communication, that it should appear that the service fee was actually paid by the person desiring the service; it being sufficient that an agreement to pay it is made with the person accepted by the telephone company as responsible.³⁹

³⁴ *Ackley v. Irwin*, 125 N. Y. S. 672.

³⁵ *Buek v. Nance*, 70 S. E. 515 (Va.).

³⁶ *Price v. Wiesner*, 111 Pac. 440 (Kas.).

³⁷ *People v. Steward*, 94 N. E. 511 (Ill.).

³⁸ *Rockwell Co. v. Warren Co.*, 77 A. 665 (Pa.).

³⁹ *Jones v. Cumberland Tel. Co.*, 130 S. W. 994 (Ky.).

TELEGRAPHS AND TELEPHONES—RIGHT TO CROSS RAILROAD RIGHT OF WAY WITH WIRES.—Where a telephone company constructs its lines along a public highway in a proper manner under the terms of the legislative grant and uses them in the public service, a railroad company has no authority, either by itself or by an employee, to treat the wires at a railroad crossing as a nuisance and cut them down, if they do not in any way endanger railroad employees or interfere with the moving of trains, or with the railroad right of way.*

TRADE MARKS—INVALID TRADE NAME—UNFAIR COMPETITION.—The word "Rubberoid" or "Ruberoid" being a descriptive word meaning like rubber was not the proper subject of a trademark by a manufacturer to designate a certain kind of roofing material manufactured by it. And it was not unfair competition for another manufacturer of roofing material to put out its goods under the name of "Rubbero" roofing, it appearing that the only imitation by the latter company of the roofing of the former company was that which existed in the use of the word "Rubbero," and that only by the asserted resemblance to the word "Ruberoid."†

WILLS—SIGNATURE—"END."—A statute requires that every will be in writing, and, unless the person making it be prevented by the extremity of his last sickness, that it shall be signed by him "at the end thereof." *Held*, that the "end" of a will, under the statute, is the logical end of testator's disposition of his property, wherever it appears on the paper, and not the point spatially farthest removed from the beginning; and where testatrix, after having written the first page of a will, skipped the second page, filled the third page, and then returned to the second, having completed the disposition of her property at about the middle of the second page, and signed her name there, the statute was complied with.‡

WITNESSES—GRAND JURY—PRIVILEGED COMMUNICATIONS—TELEGRAPHIC MESSAGES.—Telegraphic messages in the possession of the officers of a telegraph company are not privileged communications, and their production can be compelled, and an agent of a telegraph company may be compelled by proper process to produce such messages before a grand jury, and no rule of the company may excuse him from liability to punishment for refusal so to do.§

WORDS AND PHRASES—"WORKMAN"—"LABORER"—"ARTISAN"—"ARTIFICE"—"MECHANIC"—"CRAFTSMAN."—The differences in meaning of the words "workman," "laborer," "artisan," "artificer," "mechanic" and "craftsman" are as follows: "Workman" is the general term which frequently applies to one who does relatively skilled work, as contrasted with a "laborer," whose work demands strength or exertion rather than skill. An "artisan" is one who is employed in an industrial or mechanic art or trade. "Mechanic," once synonymous with "artisan," is now commonly restricted to a workman who is skilled in constructing, repairing, or using machinery. A "craftsman" is one who practices a handicraft. "Artificer" commonly implies power of contrivance or adaptation in the exercise of one's craft.¶

* *Alt v. State*, 129 N. W. 432 (Neb.).

† *Re Stinson's Estate*, 77 A. 807 (Pa.).

‡ *Standard Paint Co. v. Trinidad Asphalt Co.*, 31 S. C. 456 (U. S.).

§ *Ex parte Gould*, 132 S. W. 364 (Tex.).

¶ *State v. Ottawa*, 113 Pac. 392, Kas.

THE DOCKET.

IN OUR last number the DOCKET promised his readers a comparison of the procedure on the trial of Dickman for murder in England—the report of which was begun in that number and is concluded in this—with the procedure on a trial for murder in a city or town of one of our states. He proposes now to describe how such a case would have been begun, conducted and concluded in any one of the Western or Southwestern states. In New England the procedure would have been more nearly approached the English procedure, though it would not have been so prompt or so sure, but in any of the states from New York to California and from Minnesota to Florida the course of the trial would be substantially as stated hereafter.

IN A matter of speed, English criminal procedure is the hare and American criminal procedure is the tortoise, and in the thousands of cases which are printed in our law reports the DOCKET has been unable to find a single one in which the tortoise has under any circumstances passed the hare or even overtaken it as it did in the well known fable.

WITH *King v. Dickman* let us compare the Texas case of *State v. Oates*, reported in half a dozen current volumes of the decisions of the Court of Appeals of Texas. In November, 1904, Oates was tried for having murdered a man named Aronoff in Dallas, Texas. The proof was that two men entered the store of the deceased to rob him, and when his wife rushed to his rescue and fired a pistol at one of them, they both shot at her husband and killed him. The prisoner was convicted of murder. He appealed to the Court of Appeals and in April, 1905, that Court ordered a new trial on the ground that there had been an irregularity in drawing the names of the jurors from the box to select the venire. One of the judges refused to reverse the case on so slight a technicality, saying: "I do not think there is any reversible error in this case. While the statute directing the manner of selecting the venire is mandatory, still I do not think the legislature contemplated, nor can the courts be justified in holding, that a harmless error or an immaterial violation of the pro-

visions of the statute in reference to selecting a venire should operate to reverse a case. The facts show that there was originally 520 names in the box from which the venire was drawn; that 150 names were drawn from said box; leaving 370 names from which the appellant's venire was selected. It occurs to me that this would be such an immaterial violation, if violation at all, of the provisions of the statute, as would not authorize a reversal of this case." In the fall of 1905, the prisoner was again put on trial and a second time convicted of murder. On May 9, 1906, the case was again reversed in the Appellate Court by two judges to one on the ground that the jury should have been told that if the wife shot the husband, the prisoner was not guilty of murder. In the spring of 1906 the prisoner was once more convicted of murder by the jury, and on May 15, 1907, the conviction was affirmed. Now one would think that the judicial comedy had been played to the end, but no; the resources of the Texas criminal lawyer were not exhausted, for a month later the Appellate Court grants a reversal, overrules itself and orders a new trial, this time because the trial court did not properly define murder. In the fall of 1908 the prisoner is once more tried and convicted of murder. Again he appeals to the Court of Appeals, which, in March, 1909, affirms the conviction, but the next June it repeats what it had done two years before, orders a rehearing, reverses itself, and grants another new trial, this time on the ground that the judge who tried the case was not properly appointed to do so. In May the prisoner is put on trial again, but the jury this time disagrees, and in July, 1911, he is once more tried and convicted. once more he appeals to the Court of Appeals and once more he is given a new trial, this time on the ground of an error in the wording of the verdict. On November 4, 1911, he is again put on trial, convicted of murder and sentenced to be hanged. Here ends for the present the judicial *opera bouffe*. Tried seven times by different juries, six times convicted and sentenced to death, twice his conviction affirmed by the Court of Appeals and five times reversed by that tribunal.¹

IN THE Dickman case the trial opened on July 4, 1910. On July 7 the prisoner was convicted and sentenced to death. On July 22 at 10 o'clock in the morning, his appeal was argued before the Court of Criminal Appeal in London and at 2 o'clock in the afternoon the judgment of the Court was delivered affirming

¹86 S. W. Rep. 769; 95 Id. 108; 103 Id. 859; 121 Id. 370.

the conviction. On the morning of August 10, 1910, the convicted man was hanged.

Now let us take the various proceedings in their order. First the indictment. In the English case it is in these words:

"County of Northumberland, to wit: The jurors of our Lord, the King, present that John Alexander Dickman, on the day of, 1910, feloniously, wilfully and of his malice aforethought did kill and murder one John Innis Nesbit, against the peace of our Lord, the King, his Crown and dignity."

This is so plain and simple that it would be difficult for the most astute advocate to confuse its meaning. But if he endeavored to do so, the English law requires him to make his objection before the witnesses begin to testify, so that if there is anything wrong the judge may amend it at once, and the law also says that the formal absence of the beginning or conclusion shall not affect the validity of the indictment. But here is the ordinary form of an indictment in most of the states:

"That G. W. and C. W., late of the County of P, and State of Missouri, on the day of, 1904, at the County of P and State of Missouri, did then and there, in and upon the body of one E. P., then and there being unlawfully, wilfully, feloniously, premeditatedly, on purpose, and of malice aforethought make an assault, and with a certain dangerous and deadly weapon, to-wit, a club, which said club was then and there of the length of four feet, of the breadth of two inches, and of the weight of 10 pounds, and which said club the said G. W. and C. W., then and there in hands had and held, the said G. W. and C. W. did then and there unlawfully, wilfully, feloniously, premeditatedly, on purpose, and of their malice aforethought strike and beat him, the said E. P., at and upon the right side of the head of him, the said E. P., with the club aforesaid, and inflicting on and giving to him, the said E. P., in and upon the right side of the head of him, the said E. P., one mortal wound, which said mortal wound was of the length of four inches and of the breadth of two inches, of which said mortal wound the said E. P. from said day of, 1904, the year aforesaid, in the County aforesaid, until the day of, in the year aforesaid, in the County aforesaid, did languish, and, languishing, did live, on which said day of, in the year aforesaid, the said E. P., in the County and State aforesaid, of the mortal wound aforesaid, died; and so, L. L. C., prosecuting attorney, upon his official oath as aforesaid, doth say that the said G. W. and C. W., him the said E. P. in the manner and by the means aforesaid, wilfully, unlawfully, feloniously, premeditatedly, on purpose, and of malice aforethought did kill and murder, against the peace and dignity of the State."

On this charge the prisoner was tried and convicted of murder. His counsel made no objection to it in the trial court, but on

appeal to the Supreme Court that tribunal examines the document which one would imagine covered everything that could be said on the subject and a good deal more, and reverses the case and orders a new trial on the ground that it does not clearly show but leaves it to inference and conjecture, whether the mortal blow was inflicted with a club.² And this is only in line with numerous decisions of our Appellate Courts. In one a conviction for stealing hides is set aside because the indictment failed to state whether they were mule, cow, goat or sheep hides; in another because "father" was spelled "farther;" in another because the letter "i" was omitted in spelling malice; in another because the indictment spelled breast "brest;" in another because the indictment charged that a man who was shot through the heart did "instantly" die instead of did "then and there" die. The summit, however, of legal technicality was reached in the notorious Missouri case of *State v. Campbell*³—perhaps the most absurd judicial pronouncement that the thousands of volumes of American reports contain, and one which has become the subject of amazement and ridicule in every English speaking country. The Constitution of Missouri requires that every indictment shall conclude with a rhetorical flourish, viz., that the crime was committed "against the peace and dignity of the state." A man being convicted of a criminal assault upon a young girl and sentenced to the penitentiary appealed on the ground that his indictment concluded, "against the peace and dignity of state," instead of *the* state. The Supreme Court ordered the conviction quashed, not on the ground that the Constitution required absolutely that these words should be used; it could not do that because other indictments have been sustained which concluded, "against the peace and dignity of the State of Missouri," or "against the peace and dignity of our state." But, it said, that without the word "the" the prisoner was not informed whose laws he had broken and what state's dignity he had outraged, and that he might think it was the state of New York or Nebraska, and not the State of Missouri. The man was tried in a Missouri county. The indictment began, "State of Missouri, County of Greene," and said that the grand jury of the State of Missouri charged him with a crime and that he had committed the crime in the State of Missouri, and yet the appellate court was of the opinion that the omission of the word "the" prevented him from knowing what state's laws he had broken and whose dignity he had outraged. It was of this case that the President of the American Bar Association, Solicitor General Lehmann, spoke these words before

² *State v. Woodward*, 191 Mo. 167 (1905).

³ 210 Mo. 202 (1908).

the assembled members at the meeting at Detroit in 1909: "A man having a young woman under his protection as his ward ravishes her. Upon indictment by the grand jury and upon trial by a petit jury he is found guilty. Upon appeal the conviction is set aside, because by the carelessness of the draughtsman of the indictment or by the oversight of a copyist the definite article *the* was omitted from the concluding phrase of the indictment. Suppose, then, a similar crime were committed in my neighborhood, and the natural resentment such a crime provokes in the breast of every man would kindle the people to mob violence against the offender. Let me come out and try to quiet that mob and say: 'Take not justice into your own hands, but leave it to the orderly administration of the law.' What do you think would be the answer? 'We have no respect for a law which puts the definite article *the* in sanctity above the chastity of our wives and daughters.' "

WHAT is the purpose of an indictment? It is to enable the accused to know what the offence is with which he is charged and to enable the Court to enter such judgment as will prevent a second prosecution for the same offense. This is done in England in simple and concise language. We copy our forms from the old English law which prevailed in that country anterior to our Revolution, and our courts still hold to the ancient doctrine of Hale's Pleas of the Crown that "Murderavit instead of *murdravit* vitiates an indictment for murder." Such quibbles as these have been abolished in England for a half century; the English indictment for murder, as the DOCKET has shown above, is today a plain statement that A murdered B. But in most parts of the United States our courts still adhere to these subtilities. Why is it that the American criminal indictment or information continues to be mediaeval when the English people have made theirs modern and rational?

IN THE Dickman case no time was lost in obtaining a jury. The twelve men were probably in the box when the judge entered, perhaps the first twelve men that got into the court room. There was no examination of the jury on the *voir dire* and there was not a single challenge. Contrast this with some of the other criminal trials which have attracted public attention in the United States within the past few years—such as that of Shea, Gilhooly and Brown in Chicago, Calhoun in California, and Cooper in Tennessee; with thirteen and a half weeks, nine and a half weeks, three weeks, ninety-one days and seven weeks respectively con-

sumed in selecting a jury, thousands of veniremen summoned, and millions of words used in examining them. The McNamara trial in Los Angeles and the Hyde trial in Kansas City have now been going on for several weeks, nearly every hour of the time has been occupied in getting a jury, and at the time of the writing of these lines not a single jurymen has been finally selected, though the newspapers report that it is hoped in the McNamara case that a jury may be obtained by Christmas. At a dinner given by an Eastern Bar Association a few weeks ago, at which the DOCKET was a guest, Mr. Bryce told the lawyers that in England it hardly ever took more than a half-hour to select a jury, even in the most important cases. His statement was greeted with a burst of laughter, for his hearers seemed to think that the Ambassador was telling them a fairy tale. Only a few weeks ago, a Canadian High Court judge told the DOCKET of his having held an Assize at Windsor directly opposite the city of Detroit. The day he opened court a trial for murder began in the Criminal Court of the American city. The Canadian judge disposed of eleven criminal cases, sentenced one man to be hanged, tried fifteen civil ones and when he left the city with all the cases disposed of they had not obtained a jury in the criminal trial across the river. According to English practice a challenge on the ground that a particular juror is biased must be proved by evidence *aliunde*; it is not allowable to ask a jurymen whether he has an opinion or has expressed one. The counsel must challenge the juror he objects to, must state the ground of bias and must then produce his witnesses in support of his charge. Neither the Crown nor the defense is permitted to go on a fishing expedition in the hope of discovering from the juror's answers some ground which they had no previous evidence to support. But in the murder case in this state already referred to jurymen were asked as to their knowledge of the effect of a certain poison which the state charged was the means employed by the prisoner to effect his object and as to their opinion of the evidence of medical experts. And in a case not long ago in a neighboring state where a seller of cash registers was charged with assaulting a female in a sleeping-car, the jurors were all examined as to whether they had ever purchased cash registers or had ridden in sleeping-cars. The permitting by our judges of collateral questions like these is responsible for a great part of the waste of time in a criminal trial.

BUT the fundamental basis of the idea of a jury is very different in England from what it is in the United States. The English lawyer seems to be satisfied with twelve ordinary Englishmen of

character and intelligence; that they have an opinion on the subject is not material to him for he presumes that the verdict will be given upon the evidence and not upon the previous opinion. That a particular jurymen has formed an impression from the facts as far as he knew them does not prove, as Chesterton says, that he cannot be an impartial arbiter, it only proves that he is not a cold-blooded fool, for if you are to take all the men who have not formed opinions on some notorious case and leave out all those who have formed opinions, you will get only the stupid ones and miss all the thoughtful ones. So the English lawyers are willing as a rule to take the first twelve men that walk into the box. And as said by a recent writer: "This system works well, particularly in criminal cases. There are, of course, great differences in jurors. Every practicing lawyer knows there are acquitting juries and convicting juries. Sometimes one master mind seems to dominate and control the rest. But most lawyers would agree that taking them all around juries do show intelligence, fairness and a high sense of responsibility, and reflect in a remarkable degree the average feeling of the community."

IN THE United States, on the other hand, the lawyers are not content with the average citizen without prejudice one way or the other; the objections made to a juror in a criminal trial here show very clearly that neither counsel for the state nor for the defense is striving to obtain an impartial jury, but each one seems to be trying to get a jury of his way of thinking and which he believes will lean to the side of the prosecution or the defense, as the case may be.

IN THE examination of witnesses for both the Crown and the defense in the Dickman case, the reader will notice an entire absence of objections and interruptions on account of the questions put by the examining counsel. The report of an American trial bristles with interruptions and objections. The words "I object" follow a good proportion of the questions put and the words "I except" follow nearly all the rulings of the trial judge. The attitude of the counsel in the English case is in a very marked contrast to our own. In England the counsel for the Crown is never a partisan whose sole aim is to convict, but his function is to conduct an investigation to determine the guilt or innocence of the accused. Frequently in opening the case for the prosecution he states circumstances favorable to the prisoner as well as those tending to show his guilt. The DOCKET remembers one criminal case he heard in England where a point of material evidence that the counsel for the defence was failing to bring

before the jury was supplied by the Crown's counsel, who interrupted the prisoner's counsel by saying, "I beg my learned brother's pardon, but another one of his witnesses, Dr. A, testified very strongly to the same effect." The attitude of the counsel for the defense in England seems to be to be that of one who is endeavoring to bring out facts tending to disprove his client's guilt rather than to confuse the issue so as to make a decision difficult, or to get error in the record which may be the basis of appeal. He seems not to forget that he is a member of society, interested in the guilty being punished as much as any layman, and that it is not for him to aid a guilty man to escape. Is it not plain to the ordinary observer that the attitude of the counsel for the state in America is that of one who strives for a conviction at all hazards, and the attitude of the counsel for the defense that of one who seeks to confuse the issue so as to make a decision difficult by the jury or to get error in the record to enable him to get a new trial? The reader will perhaps have noticed that in the Dickman case before beginning his address to the jury (ante p. 663), the prisoner's counsel stated to the Court and the jury that he appreciated the absolutely fair way in which the case had been conducted by the opposing counsel, but unfortunately, the newspaper accounts of both the Hyde and McNamara trials show frequent angry altercations between counsel, charges of bad faith and prejudice and even a proposal in the latter case by one lawyer that they should settle their differences outside. And the presiding judge does not always escape criticism and threats of removal for unfairness by counsel for the defense.

NOTHING affords a greater contrast between English and American trial methods than the leading part the trial judge plays in the trial of a case in England with the minor position to which he is relegated by the trial practice in most of the states. In England the judge retains all the powers which he had at Common Law, which are well described by Lord Hale in his *History of the Common Law*, where he says, "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them, and also in matters of fact to give them great light and assistance, by his weighing the evidence before them and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen." No lawyer can read the summing up of Lord Coleridge in the Dickman case without being impressed not only with the great ability with

which the evidence was marshaled, but also with the fairness with which the issues of fact were left to the jury for their determination.

BUT except in our Federal Courts and a few of the states, all of our criminal trials take place without the light and assistance which Lord Hale spoke of, for to attempt in the smallest degree to give such aid is reversible error in the opinion of our Appellate Courts in their construction of the laws passed by our legislatures on the subject. Our judges are absolutely prohibited from giving such a charge to the jury as that of Mr. Justice Coleridge in the trial of Dickman; all they can do is to submit to the jury bald propositions of law, prepared generally by the attorneys and so in conflict with one another, as they come from different sides in the case, as to be not only no light and assistance to the jury, but rather a means of confusing them upon the very questions they are called upon to decide. Jurymen, as has been said by a Justice of the Supreme Court of the United States, are plain, unlettered laymen, wholly unable to comprehend the nicer distinctions of the law, and caring only to reach a verdict that shall be consonant with the general equities of the case, and not directly in the teeth of the Court's instructions. Nothing can be more unsatisfactory or misleading to them than a case submitted upon naked, disconnected propositions of law. And another great judge, now governor of the State of Connecticut, has pointed out that the mode of trial as it existed at the Common Law was well adapted to secure the rights of the masses against the classes. But it was a system of exact balances. It demanded a free and fearless judge as well as a free and fearless jury. The jury may drag the car of justice, but the judge must drive, or they will drag it to destruction. The inroads of the bar upon his prerogatives are a mark of the degrading effects of the American plan of an elective judiciary, and indicate a distrust of the independence and the intelligence of the Court.

IN THE Dickman case as soon as the verdict was rendered, the judge at once passed the sentence of the law upon the convicted man and the trial was over for ever and ever. But in an American case the rendering of the verdict is followed by a motion for a new trial, time is given to prepare an argument, the case is adjourned for days and weeks to give the lawyers time to hunt for errors in the trial and to invent reasons why it should be all gone over again. When the argument for a new trial is made, the judge takes another month or so to consider it and if he decides not to grant it, then comes the appeal to the Supreme Court, the preparation of voluminous records and of interminable printed briefs.

IN THE Dickman case the prisoner was convicted on July 7 and on July 22, though the trial took place at the other end of England, the Court of Appeal was hearing the appeal in London. There had been no intricate machinery in bringing up the case and not a single question of appellate jurisdiction is raised. There are no printed briefs, the arguments of the counsel on both sides are entirely oral. When a question arises in regard to what a witness has said on the trial, and as to how completely he has identified the prisoner, the witness is brought before the Court of Appeal and questioned by the judges to enable them to decide upon the question involved, and as soon as the argument is over, the Court at once delivers final judgment.

IN AN American criminal appeal, which would take in this state a year or more to get from the trial court to the Supreme Court, there would be long arguments whether or not the proper procedure had been taken in bringing the case to the higher court. Nothing but what appeared in the written record would be considered by the Court. If by some accident the record did not show that the prisoner was present at the trial the Supreme Court would not allow it to be proved orally that the prisoner was actually present, but would order the whole trial to be had over again. In an English case though there might be some technical errors in the evidence or with the procedure, the case would be affirmed if the judges thought that no "miscarriage of justice" had occurred, while under the American system any matter of this kind would be presumed to have caused the prisoner injury and the Appellate Court would not even consider whether as a matter of fact it had done so or not. When the argument was over the judges would not decide the case but would reserve judgment for weeks or sometimes months. Then an elaborate written opinion would be filed, and if it was against the prisoner there would be a motion for a rehearing, and very often, as in the Texas case quoted above, the judgment affirmed would be reversed and a new trial ordered.

WITH the judgment of the Court of Appeal on the 22d of July, the Dickman case was at an end so far as the courts were concerned. A petition for a reprieve was sent to the Home Secretary, who is the adviser of the King in matters of pardon. On the 3d of August notice was given that the petition was rejected and on the 10th of August the prisoner was hanged.

IN AN American case the judgment of the Appellate Court is often followed by an appeal to the Supreme Court of the United States, or by a writ of habeas corpus to the trial judge and an appeal from his decision to the Appellate Court—all of which are simply moves to put off the execution of the sentence. When these proceedings are exhausted, the governor is flooded with petitions for a commutation of the capital sentence. He is induced to extend the time set for execution from month to month and in a large proportion of cases of capital convictions the prisoner's sentence is finally commuted by the Chief Executive.

BOOK REVIEWS.

THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT.—By BRUCE WYMAN, A. M., LL. B. Professor of Law in Harvard University. 2 vols. New York: Baker, Voorhis & Co. 1911.

It is not often that the lawyer today finds a law book in two volumes that he can be induced to read from cover to cover, but this treatise by Professor Wyman on the important subject of Public Service Corporations is so concisely written, so interesting and so pleasing in its style that one finds it hard, having once taken it up, to put it down again. Most of our bulky legal treatises of today are really digests of the decisions of the courts and serve simply as indices to the judicial decisions. To have on one's shelves a complete discussion of legal principles on all matters relating to the great public service corporations of today, the common carrier, the railroad, steam or electric; the inn-keeper; the gas, the water and electric light company, and all others engaged in public employment is, indeed, a boon. There have been few books which have fallen under our notice during the past decade that we can recommend as highly and as strongly to the profession as we can these two volumes.

Professor Wyman gives a most valuable survey of the difference between a public calling and a private business—a distinction, as he points out, rather one of legal control than of degree. The public calling has always been subject to public regulation and control and charged with more than an ordinary liability; the private merchant, artisan or professional man was always held to a less legal liability and was allowed to deal with whom he chose. How some callings have from the early history of the common law remained public ones; how some which were once public are now regarded as private and how some which were formerly private are now looked upon as public, these matters are clearly shown and most ably discussed by the learned writer. Of the six minor callings, namely: the surgeon, the tailor, the smith, the victualer, the baker and the miller, the latter seems to be the only one regarded as of a public nature. Of the others, Professor Wyman says:

"The case dealing with the *common surgeon* most often cited is an anonymous suit in 1441. This was a writ of trespass on the case against one R., a veterinary surgeon to the effect that the defendant had undertaken to cure the plaintiff's horse with skill and care of a certain trouble, and that he then so negligently and carelessly gave his medicine that the horse died. But Judge Paston said: 'You have not shown that he is a common surgeon to cure such horses, and therefore although he has killed your horse by his medicines, you shall have no action against him without an *assumpsit*.' The court accordingly decided that a traverse of the *assumpsit* made a good issue. The significance of an actual *assumpsit* in those days was that when one man had authorized another

to deal with personal property in the course of private business, the latter was under no legal liability to use care, unless he had made an express undertaking to that effect and entered upon the performance of it. In public business, on the other hand, the legal obligation to perform the act with proper skill in accordance with the public profession was well established. From other cases it is plain that the curing of man or beast was considered a public calling. In the rude England of these unlettered times such professional men were comparatively few. Frequently only one surgeon would be at hand in any one district, so that if he should refuse his services, all might be lost. Such being the situation it is easy to understand why the law was so stern in the case of the common doctor, requiring him to cure all who came by reason of his general profession and giving the patient an action, if the doctor was negligent, although no care had been promised in the particular case. It was the unusual situation which produced this extraordinary law. Today, however, there are so many physicians in most communities that the law apparently no longer deems it necessary to compel them to accept any patient who may call upon them.

"Some light upon the position of the mediaeval *tailor* before the law we obtain from an opinion of the great Brian: 'I know well, if I put a robe with a tailor to be made (or if I come to a common inn or a common smith with my horse), in all cases of the sort I may have my robe lying in the tailor's shop as long as I please (without its being subject to distraint); for he is compelled by the law to do it, and he may by the law detain until he be satisfied for the making.' It is rather difficult at present to imagine a state of society where there was not competition enough among tailors. Still, the time was when this most necessary calling was followed by so few comparatively that for the protection of the public coercive law was deemed necessary. But in this calling there has been lively competition for so long that the tailor at a very early time dropped from the list of public callings, and is mentioned in the books no more as a member of this exceptional class of public servants.

"Another instance is shown in an anonymous memorandum of 1450. 'Note that it was agreed by all the court that where a *smith* declines to shoe my horse, or an inn-keeper refuses to give me entertainment at his inn, I shall have action on the case, notwithstanding no act is done; for it does not depend upon agreement. But where a maker makes a bargain to build me a house and does nothing, no action on the case, because that does sound in agreement.' The meaning of this is that in those days no action lay upon a mere bargain and even the promisor in a contract need not perform; but one who undertook a public employment must perform, whether he agreed or not. Here again the obligation resting upon those in common callings to serve all that apply is the basis of the case. Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different. So far apart were they in the eyes of the court, that the ordinary law was protection enough for those that dealt with the

carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There is time enough in getting at builders to make the situation in that business one of virtual competition, so that there would be no hardship in leaving builders free to bargain; but the farriers were so scattered that those who required their service immediately, were at the mercy of the particular one at hand. A special code, therefore, was necessary else a good horse might be ruined for want of a shoe, if the wayside smith should take it into his head to refuse service. Under modern conditions of trade, however, the public need is not so imperative as to keep the blacksmith in the class of public servants.

"There was a time also when common *victualers* were strictly regulated by common law. The regular purveying of food and drink to the local public was felt to be of as much importance as the proper entertainment of the traveling public at the established inns. In a leading case in 1460 Judge Moill treated these two callings as analogous. 'If I come to an inn-keeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualer to buy victual and he will not sell; I shall have an action of trespass on my case against him.' Without such regulation it was felt that there might be oppressive treatment as the need of the purchaser was usually immediate and his market limited in many ways by the economic conditions of early trade. And to the strictness with which the sale of such necessities of life as bread and beer were regulated innumerable assizes bear witness of. A certain police power is still exercised today over these matters, but beyond this even those selling the most necessary food may refuse to sell any person; a baker may refuse to sell bread to a starving man who tenders payment so far as the modern law goes. This is only to be explained on the ground that there is now usually sufficient competition among dealers so that a case of refusal of a cash buyer can hardly be imagined. Even so a man turned away can usually find another stock nearby.

"In the manorial economy the *baker* has his established place and was obliged therefore to supply his patrons upon reasonable terms, his rights being recognized and his obligations being enforced in the seignioral courts. Even after the business of baking became enfranchised by the breaking up of the mediaeval system, the bakers at hand in any community had still such control of their local patronage as to make their continued regulation seem still necessary. Thus we have the assize of bread as a regular part of the royal eyres; indeed the assize of bread was defended as late as the nineteenth century in an Alabama case. 3 Ala. 137."

But notwithstanding the wide range of the author's study in this department of the law and the careful attention to the details of the different callings, there are two subjects we should like to have had him discuss and two questions we should liked to have had answered. The first is, is an inn-keeper bound to charge only a reasonable price for his services, and to what extent, if at all, is the obligation different from that of a

common carrier in this respect? May the State regulate his charges, and, in the absence of such regulation, may he ask more than a reasonable price? Because a common carrier expects a large number of passengers at a particular time, can he double or treble his charges? Yet this is what the inn-keeper is constantly doing. At the time of the Louisiana Purchase Exposition, there was a public demand that the railroads should reduce their rates from all parts of the country to St. Louis, and the railroad companies did so, but as the rates of the railroads decreased, those of the inn-keepers increased. No one seems to have thought of protesting against this, yet where is the difference?

The second question which the learned author does not answer satisfactorily is as to how far a common carrier of passengers may consistently, with his duty to furnish comfortable transportation, overcrowd his vehicles? The author says (Sec. 803) that a street car company could not be expected to provide seats for every passenger at those hours in the morning and evening when there is more than an ordinary demand for transportation. But what about overcrowding the car so that the comfort and health of the passengers are affected, and men and women are jostled and their clothing torn and passengers sometimes even knocked down? Is this legal, or is the carrier bound by law to prevent it?

STUDIES IN AMERICAN ELEMENTARY LAW.—By JOHN C. TOWNES, Professor of Law, University of Texas. Second Edition. Chicago: T. H. Flood & Co. 1911.

The first edition of this little treatise was published in 1903. Since that time Professor Townes has used it in his classes in the subject at the University of Texas, and he seems to have become more "thoroughly convinced of the practicability and value of the study of Elementary Principles as the introductory topic in the study of the law." He had previously come to the conclusion that there is certain matter which is very properly to be called elementary law, and had formed a definite idea of what it is and how it is to be taught. Of course, to that school of law students and teachers who take issue on the first of these questions, the book has little interest. But it is probable that many who believe that "Elementary Law" is not a spurious title, would take issue with Professor Townes on the question of what it includes. Part I of this book is little more than what is ordinarily given in an elementary course in political science, and Part II contains about what is ordinarily included in a college course in government. Part III includes a discussion of some terms which the beginning law student does not use very intelligently, to be sure, but it is doubtful whether the familiarity with them is a sufficient reward for the time spent in a separate course on the subject. The book contains very little matter which the average law student will not have mastered in two years in a law school. It is written for law students, and schools which insist on separate courses in elementary law may find it a useful treatise.

A TREATISE ON THE MODERN LAW OF EVIDENCE.—By CHARLES FREDERIC CHAMBERLAYNE, of the Boston and New York Bars. 2 vols. Albany, N. Y.: Matthew Bender & Company. 1911.

The law of evidence has been very thoroughly written upon in the United States, beginning with Greenleaf and ending with Wigmore, the two great writers on this subject. Every one of its phases has been again and again classified, discussed, examined and analyzed, not only by these two masters, but by numerous other writers on particular or subordinate topics.

The author of this new and ambitious treatise justifies its appearance in the fact that it approaches the subject from a different standpoint than do the former works in that it considers the adjective law of evidence from the standpoint of administration rather than from that of procedure.

The order of treatment in the present work is determined by the extent to which the operation of this judicial function of administration is present in the practical handling of the law of evidence. The first volume defines administration itself, states the canons under which it is exercised, the general relations between matters of fact and rules of law as these are understood in English jurisprudence and, also, the varied functions of judge and jury, not only in respect of the distinction between law and fact, but to the proper position of each branch of the tribunal to the other as these are modified or controlled by the function of the judicial administration itself. Its final chapters are appropriated to a limited consideration of the subject of Knowledge, divided, for convenience, into Judicial, Common and Special. The second volume, following out the same line of treatment, discusses the branches of the law of evidence in which the element of administration is least operative.

The author says: "Like the subject of Knowledge with which the first volume closed, that of Burden of Proof in its double aspect of Burden of Establishing and Burden of Evidence, with which the second volume opens, have no distinctive relation to the law of evidence but pertain rather to the field of reasoning in general. As Knowledge furnishes in its accumulation of past inferences or observations the basis of the reasoning faculty, Burden of Proof concerns itself largely with Pleading, the branch of adjective law which formulates the objective toward proof of which the processes of the reasoning faculty are to be directed in the use of evidence. Prominent among topics in the law of evidence in which the element of procedural law seems most efficient in resisting the inroads of rational administration is that of Presumptions of Law. These relate, correctly speaking, to various branches of the substantive law, civil or criminal, to which they are properly attached. Carefully to be distinguished from them are certain so-called 'presumptions,' which have little in common except the indifferent use of a single name or term. They are, on the other hand, Inferences of Fact, a matter of logic, and, on the other, Assumptions of Administration, with which logic has nothing whatever directly to do. Contrasted with both these, Inferences of Fact and Administrative Assumptions, is a third class, maxims of jurisprudence,

rhetorical paraphrases of existing rules of law usually stated in another way. To them the term Pseudo-Presumptions seem properly to have been applied. They are responsible for most of the confused learning relating to 'Conflict of Presumptions.' Admissions seems also to be a topic in which the procedural as distinguished from the rational element in the law of evidence is unduly large. Whether taken in its judicial or extra-judicial form, the distinction between the two consisting in the circumstance as to whether the statement was or was not made in the course of the trial in which it is offered, the declarations of a party including those made for him by agents or privies, seem manifestly affected in a large degree both as to admissibility and probative force by the influence of early procedure. This observation seems scarcely to apply to so-called Admissions by Conduct, which though usually treated in this connection seem devoid of special procedural efficiency and merely to constitute a convenient term for logically probative circumstantial evidence of acts done by a party. A topic in which a once powerful procedural element seems rapidly shading into questions of logical impairment due to the operation of a desire to buy peace appears to be that of Offers of Compromise. Procedural influence, i. e., that of substantive law operating through rules of procedure, apparently culminates in intensity in connection with the subject of Confessions. Into the baffling intricacies of the operation of the Misleading Inducements of hope or fear, the privilege against involuntary Self-Incrimination, or the power of Duress in making certain statements of an accused person "involuntary" as it is called, it has seemed necessary to follow the tangled threads of law and logic. By comparison, the procedural rules, largely yielding to the influence of rational administration, under which the evidence of a witness given at a former trial is received seem simple and practically illustrative of the normal operation of judicial administration where a primary grade of evidence must be supplied by facts of a secondary nature." The work when completed will cover four volumes.

An examination of these two volumes convinces us that the work will be of great value to the practicing lawyer. The author is well known to the profession for he has been the American editor of two of the standard English works on the subject, those of Taylor and Best.

THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION AND THE DOCTRINE OF RENVOL.—By NORMAN BENTWICK, London. Sweet and Maxwell, Limited. 1911.

This is the substance of a Yorke Prize Essay at Cambridge University in 1910. It is a lucid exposition of the English law of domicile, and a brilliant defense of the Renvol doctrine. For this latter the book is a valuable contribution to legal literature, though one may doubt whether the author's championing of this disputed doctrine is not too enthusiastic. It is difficult, for instance, to find any support for it in *Dupuy v. Wurtz*, 1873 (53 N. Y. 556), which is to be rested solely on the ground that no new domicile had been obtained, and the New York domicile continued

to be that of the deceased. This case simply follows the general American rule that a domicile continues until a new one is gained. It is no authority for saying that the so-called English doctrine "of applying the whole law of a foreign country where reference is made to it by the *lex fori*" has been adopted in the United States.

The notion that courts are sometimes called upon to apply the law of foreign countries, as foreign law, is responsible for the author's view of Renvol. But with so many decisions to the effect that it is not foreign law which is being applied, but a rule of domestic law which is merely borrowed from a foreign law, what can be left of the doctrine of Renvol in American law? And since its rejection by the Institute of International Law at Neuchatel in 1900, it is doubtful if even a clever treatise such as this by Mr. Bentwick can establish it among scholars.

THE LAW OF MOTOR VEHICLES.—By BERKELEY DAVIDS, of the District of Columbia Bar. Northport, L. I., New York: Edward Thompson Company. 1911.

We remarked in a former number of the REVIEW (45 Am. L. Rev. 632), that how great a place the motor car has taken in our every-day life was most forcibly illustrated by the appearance of a large volume of over 1200 pages on the law applied to motor vehicles. This was the work of Mr. Babbitt, of the Massachusetts Bar. The present treatise by Mr. Davids, a contributor to this REVIEW and a writer of experience, is not as bulky as the earlier work, nor is its scope so wide, but it will be found a very useful treatise on the subject. Of great value is the appendix of more than 300 pages, setting out at length the statutory laws relating to motors of all the states and territories, the District of Columbia, the Canadian provinces and England. This feature alone makes it a valuable book to have on the shelves of the practicing lawyer.

THE LAW OF STREET RAILROADS.—By ANDREW J. NELLIS. Second Edition. 2 vols. Albany, N. Y.: Matthew Bender & Company. 1911.

This is the second edition of a work which has already been extensively used and which has been found satisfactory to the profession. It is a complete treatise on the law relating to the organization of street railroads, the acquisition of their franchises and property, their regulation by statute and ordinance, their operation and liability for injuries to the person and property of passengers, employees and travelers and others on the public streets and highways, and there are likewise chapters on pleading and practice, evidence and damages. The author has endeavored successfully to cite all the cases where a street railroad has been a party to an action in the courts, and has well said in the preface: "The enormous increase in the volume of street railroad accident litigation, due to the astonishing development of the electric railway system in this country in recent years, has created a demand in the profession for a work giving the

general principles and rules of law, the application of which must determine cases arising where exact precedents are not to be found, and giving in brief and compact form a clear statement of the precedents established by the decisions of the courts. To gather together, classify, analyze, and arrange the thousands of decisions of the courts, and present, in form for ready reference and use, the rules and principles established, with the reasons upon which the same are founded, with as full a presentation as practicable of facts in the text and the copious notes thereto, has been the aim of the work and has proven a laborious task, but the results achieved must be serviceable to the profession."

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All communications for the editor should be sent to

JOHN D. LAWSON,
14 South Broadway,
St. Louis, Mo.

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